Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,
JAMES B. EDWARDS, SECRETARY OF ENERGY,
AND TOSCO CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether it is proper for a federal court of appeals to ignore findings and conclusions made by a district court in granting a preliminary injunction and to fail to limit its scope of review to assessing whether the district court's action was a clear abuse of its discretion.

2. Whether a federal court of appeals can, in conflict with other federal courts of appeals, require a party seeking a preliminary injunction to satisfy a standard that imposes a burden of showing conclusively that irreparable injury will occur and that additionally ignores, rather than balances, other factors, particularly the applicant's likelihood of ultimately prevailing upon the merits.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

Mobil Oil Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Temporary Emergency Court of Appeals in *Mobil Oil Corp.* v. *DOE*, ___ F.2d ___ (TECA 1981), entered on August 14, 1981.[1]

OPINIONS BELOW

The opinion of the district court is not reported, but is reprinted in the separate Appendix as App. B (9a-85a). The opinion of the court of appeals — the decision from which certiorari is sought — is not reported, but is reprinted as App. A (1a-7a).

[1] The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed. The list naming all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Mobil, required by Rule 28.1 of this Court's Rules, was included in Mobil's Application to Stay Mandate Pending Certiorari, filed on September 2, 1981, and is incorporated here by reference.

JURISDICTION

The court below entered judgment on August 14, 1981. App. A (1a). Under section 211 of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. §1904 note (1976), a petition for certiorari may be filed within 30 days of the judgment of the court of appeals. This Court has jurisdiction to review the judgment below under section 211(g) and 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of the Emergency Petroleum Allocation Act of 1973, *as amended*, 15 U.S.C. § 751 *et. seq.* (1976) and sections of Subpart C of the Mandatory Petroleum Allocation Regulations, 10 C.F.R. § 211.61 *et. seq.* (1981), are reprinted in the separate Appendix as App. E (91a-93a) and App. F (95a-128a), respectively.

STATEMENT OF THE CASE

Mobil Oil Corporation brought this action under section 211 of the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. § 1904 note (1976), in the District Court for the Northern District of New York alleging that there were serious flaws in the administration by the Department of Energy of its Entitlements Program, under which the Department required companies that refine crude oil to make huge cash payments to each other for the purpose of equalizing the economic benefits of refiners' varying access to price-controlled crude oil. Mobil sought a preliminary injunction to bar the issuance of the final entitlements list (the order requiring purchase and sale of entitlements) and the termination of the Entitlements Program until the Department of Energy corrected flaws in the program. The district court, in an 80-page opinion, granted a preliminary injunction, finding a great likelihood of success on the merits, irreparable injury to Mobil in the absence of relief, lack of injury to DOE or other parties from the injunction, and consistency of the relief with the public interest.

Without discussing the district court's opinion, and without mentioning that the district court had written an opinion, the

court of appeals reversed. It held that Mobil had failed to establish the certainty of irreparable injury in the absence of preliminary relief. Accordingly, the court of appeals held that preliminary relief must be denied.

Mobil sought a stay of mandate pending certiorari from the court of appeals by motion of August 19, 1981. That motion was denied on September 2. On that date Mobil sought a stay from this Court. On September 3, Justice Brennan stayed the mandate until further order (No. A-192).

A. *Regulatory Background*

While the details of the operation of the Entitlements Program are complex, the theory of the program was quite simple.[2] The program was intended to equalize the economic benefits of access to lower cost price-controlled crude oil among companies that refined crude oil. This equalization was accomplished on a monthly basis by requiring refiners that reported proportionately greater access to price-controlled crude oil to make cash payments to refiners that reported proportionately lesser access. The average access to price-controlled crude oil was established on the basis of reports from all refiners of price-controlled crude oil receipts compared to reports of all crude oil refined for the month.

The basic mechanics of the program were as follows. An "entitlement" was, in essence, a license to refine price-controlled crude oil. One entitlement was needed for every barrel of price-controlled crude oil a company refined.

Every month the Department of Energy calculated how much price-controlled crude oil was available nationwide on the basis of reports from refiners as to the crude received at their refineries. Then the Department issued entitlements to all refiners. The number issued to each refiner was supposed to represent one entitlement for each barrel of price-con-

[2] The operation of the Entitlements Program is set forth in detail in the opinion of the district court. App. B (11a-18a).

trolled crude oil that the refiner would have had if all refiners had had proportionately equal access to price-controlled crude. If a refiner was issued fewer entitlements than barrels of price-controlled crude oil that it reported, the Department ordered it to buy entitlements at a fixed price from refiners that had been issued more entitlements than they needed. Criminal and civil penalties could be imposed against any firm that failed to follow the Department of Energy's orders.

As the district court found, there has always been an incentive for refiners to avoid reporting the receipt of price-controlled crude oil, since the fewer barrels of price-controlled crude oil a refiner reported, the fewer entitlements that it had to buy (or the more that it could sell). *See* App. B (18a-27a), (39a-45a). The district court also found that the agency's regulations gave refiners flexibility in reporting refinery receipts of price-controlled crude oil, such that refiners could choose an accounting system that permitted them to build up inventories of price-controlled crude oil not technically booked into their refineries and thus not incurring any entitlements obligations. Mobil did not have such a system. It reported for entitlements purposes any price-controlled crude oil it acquired.

As early as 1977, Mobil advised the Department of Energy that the Department's own published figures were showing that substantial volumes of crude oil that had been reported to the agency as being price-controlled when they were produced at oil fields were never reported as price-controlled refinery receipts. When President Carter announced the phased decontrol of crude oil pricing in 1979, the incentive to avoid reporting the receipt of price-controlled crude oil became stronger. All a refiner had to do to make an immense profit was buy price-controlled crude oil, hold it in a nonrefining inventory until after decontrol, and then sell it at the free market price, without ever having incurred an entitlements obligation on it (*i.e.*, without having had to share the benefit of access to it).

After announcement of phased decontrol, the rate at which price-controlled crude was disappearing increased rapidly. By

the time President Reagan announced immediate decontrol on January 28, 1981, the incentive was overwhelming and the gap between barrels of price-controlled oil reported as produced and barrels reported as received by a refiner for entitlements purposes had become immense. App. B (20a-22a).

As the district court found, this "disappearance" of price-controlled crude oil had serious consequences for the integrity of the regulatory scheme, the consumer, the refining industry, and refiners, including Mobil, that had not caused the disappearance. App. B (24a-26a). Because not all price-controlled crude oil was reported, the Entitlements Program could not and did not achieve its purpose of equitably distributing access to *all* price-controlled crude oil. This effect was felt concretely and massively. The fewer barrels of price-controlled crude oil reported, the lower the national average of price-controlled crude oil available for sharing, which resulted in the issuance of fewer entitlements to all refiners and, consequently, higher crude oil acquisition costs for all. These higher crude oil costs could be passed on to the consumer. App. B (24a). The district court found that in 1979 and 1980, refiners' crude oil costs had been wrongly increased by $5.6 billion to the great injury of those refiners, like Mobil, that had not manipulated inventories. App. B (24a).

The impact on Mobil provided a dramatic example. When the average volume of price-controlled crude oil declined, due to "disappearing" crude oil, Mobil had to buy more entitlements to make up for the increasing gap between the artificially decreased industry average and Mobil's refinery receipts. The district court found that in 1979 and 1980, Mobil was forced to pay $284 million for *additional* entitlements because of disappearing price-controlled crude oil. App. B (26a). The district court also found that if the final regular entitlements notice requiring the purchase and sale of entitlements is issued, Mobil will be forced to buy an additional $50 million worth of entitlements. App. B (77a).

B. ***The District Court's Opinion***

In an exhaustive 80-page opinion the district court preliminarily enjoined the Department of Energy from terminating the program by issuing final entitlements notices. The final regular notice, which reflects transactions for the first 27 days of January, 1981,[3] would require Mobil to buy an additional approximately $50 million worth of entitlements. App. B (77a). The court made extensive findings based on live testimony, public data compiled by the Department of Energy, and a report prepared by an independent consultant for the agency.

The district court found that Mobil was likely to prevail on the merits. App. B (65a-75a). In short, the district court found that substantial quantities of price-controlled crude oil had "disappeared," that the disappearance materially distorted the Entitlements Program and subverted its purpose, that the cause of the disappearance was regulatory loopholes that permitted some companies to avoid reporting receipt of price-controlled crude oil, and that the Department of Energy had been aware of the problem for four years and had refused to do anything about it.

The district court also found that Mobil would suffer irreparable injury if the final entitlements notice was issued without corrective action by the agency. App. B (75a-80a). The court found that there was no remedy available to Mobil that could provide return of the $50 million it would be required to pay, let alone return of the $284 million Mobil has already lost, should Mobil prevail on the merits.

[3] Entitlements notices were issued two months after the applicable transactions occurred. *See* 10 C.F.R. § 211.66. After oral argument in the court of appeals, the Department of Energy issued final so-called "clean-up" regulations specifically designed to end the agency's role in the program. The proposed "clean-up" regulations, discussed by the district court, did not deal with the problem of disappearing crude oil, App. B (78a-79a), and the court of appeals did not conclude to the contrary.

The district court also found that the public interest would be best served by terminating the Entitlements Program only after all price-controlled oil has been accounted for. App. B (80a). The court further found that the Department of Energy as administrator of the program would not be injured by the issuance of an injunction. App. B (80a). Finally, the district court found that all refiners that did not cause crude oil to "disappear" would benefit from the issuance of an injunction that required the agency to take corrective action. Conversely, the only refiners that would benefit from the failure to issue an injunction are those companies that are responsible for the problem and that unjustly benefited from disappearing price-controlled crude oil.[4]

C. *The Court of Appeals' Decision*

The Temporary Emergency Court of Appeals reversed the district court in a terse seven-page opinion that does not even mention that the district court wrote an opinion. App. A (1a-7a). The court of appeals did not address the merits, except to quote language from a decision by the Department of Energy's Office of Hearings and Appeals agreeing with Mobil's position on the merits. Indeed, the court of appeals did not discuss or even mention any of the findings made by the district court. The court of appeals reversed the district court on the sole ground that Mobil had "failed to make a clear showing that it will suffer irreparable harm if an injunction does not issue." App. A (4a). The court of appeals reasoned that Mobil had not shown irreparable injury because three purported avenues of relief were said to be available: (1) court challenge of the determination of the Department of Energy's Office of Hearings and Appeals that it lacked jurisdiction over Mobil's claim; (2) Mobil's Petition for Emergency Rulemaking that had been pending since February 10; and (3) the right to appeal administratively from the issuance of a final

[4] App. B (81a). Significantly, no evidence was presented to the district court concerning harm to any company in the event an injunction was issued.

rule that does not address the problem raised by Mobil — *i.e.*, the right to ask the agency to change its mind.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Failed To Limit The Scope Of Its Review To Determining Whether The District Court Had Abused Its Discretion.

This Court has repeatedly ruled that the scope of appellate review of the grant or denial of preliminary injunctive relief is to be confined solely to the abuse-of-discretion standard. *E.g.*, *Doran* v. *Salem Inn*, 422 U.S. 922, 931-32 (1975); *Brown* v. *Chote*, 411 U.S. 452, 457 (1973). This standard has been uniformly mandated by this Court for many years. *E.g.*, *Alabama* v. *United States*, 279 U.S. 229, 230-31 (1929); *Meccano, Ltd.* v. *Wanamaker*, 253 U.S. 136, 141 (1920).

The court of appeals here simply ignored this limitation on its scope of review. The court did not acknowledge that the standard applied, and in reversing it did not deal with or even mention any finding or conclusion that the district court had made in the course of its exhaustive 80-page opinion. In fact, the court of appeals did not even mention that the district court had written an opinion.[5]

[5] A number of statements in the text of the court of appeals' opinion also make it clear that that court effectively considered *de novo*, rather than on the basis of the district court's decision, the question of whether Mobil was entitled to a preliminary injunction. The court of appeals stated, for example, that it found it "unnecessary to review the merits of *Mobil's explanations* of how it sustained the contentions it advances." App. A (4a) (emphasis added). It also held, "*this court finds that Mobil has failed to make a clear showing* that it will suffer irreparable harm if an injunction does not issue." *Ibid.* (emphasis added). The court later stated, "*with the finding that Mobil has failed to show irreparable harm*, we need not reach the question of the construction of section 211 of the Economic Stabilization Act . . . ." App. A (7a) (emphasis added).

All of these statements reflect the court's error. What it should have been reviewing was not "Mobil's explanations," but the district court's findings of fact and conclusion, reached after a lengthy

The court of appeals' failure to treat the grant of preliminary relief as being within the district court's discretion and to defer to — much less to mention — the district court's opinion is egregious error that warrants correction by this Court.

A motion for preliminary injunction, coming at an interlocutory stage of litigation, must be decided on the basis of an incomplete record. At such an interlocutory stage, the district court's day-to-day familiarity with the case is of unique value.[6] That is particularly so where, as here, the district court's decision, even though preliminary, is based upon substantial volumes of evidence; here there were both live testimony and hundreds of pages of exhibits (by volume, most of the documentary evidence being DOE's own material offered by Mobil). Even on the issue of irreparable injury — the only issue thought to be relevant by the court of appeals — the district court's opinion contains an extended factual and legal discussion. App. B (75a-80a). Not even this section of the district court's opinion was referred to by the court of appeals.

Thus, this case represents a serious departure from the long-established and frequently repeated standard of review set by this Court. This Court should correct that error.

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discussion of the evidence and the law, that Mobil had an overwhelming chance of success on the merits. App. B (65a-75a). Similarly, it was not appropriate for the court of appeals to "find" that Mobil had failed to show irreparable injury; rather its task was to assess whether the district court's findings and conclusions on that question (App. B (75a-80a)) were an abuse of discretion.

[6] Even in the short time the case was before him, Judge Munson had entertained, heard argument, and ruled upon a large number of matters — motions by the government to dismiss and to quash a subpoena for documents, a motion for a temporary restraining order, the separate question of the court's jurisdiction to grant relief (not at issue here), and supplemental briefing on the significance of a massive DOE study, which Mobil argued, and the court found, supported Mobil's other evidence. Aside from his 80-page opinion granting a preliminary injunction, issued on June 3, 1981, the district court also issued a ten-page decision on May 15 partially granting and partially denying the government's motion to quash a subpoena and an opinion on its grant of a temporary restraining order on April 29.

There is a second reason for this Court to act on this question. Not only did the court of appeals disregard its own limited review function, but it did so in circumstances that will particularly discourage district courts from pursuing their appropriate functions. Here the district court undertook to prepare in a matter of 22 days (the time between hearing and decision on preliminary relief) a massive and comprehensive opinion assessing the legal background and the evidence and setting out its findings and conclusions on every issue raised by the parties. This labor must have been performed at great inconvenience to the district court, but it no doubt represented that court's desire to fulfill its obligation to explain its decision in an important case. By ignoring this exemplary effort the court of appeals effectively told the district court that it had been wasting its time in expressing its views. That message creates an unfortunate precedent that this Court should erase.

This Court has granted certiorari and received briefs on the merits, but not yet heard oral argument, on a similar issue. In *United Steelworkers* v. *Swint*, No. 80-1193, 49 U.S.L.W. 3788 (April 20, 1981), the Court agreed to consider whether the courts of appeals are always bound by the clearly erroneous standard of Rule 52(a), Fed. R. Civ. P., in reviewing a district court's factfindings. The Fifth Circuit had there held that that standard does not apply where findings are made under an erroneous view of the law. In the present case the court of appeals has effectively held that there are circumstances, not defined, in which a court of appeals may dispense with the abuse-of-discretion standard, which covers both matters of fact and legal issues,[7] that normally applies on review of a district court's disposition of a motion for preliminary injunction. We submit that the issues are related and are of equal importance, and the Court should consider and dispose of the two cases together.

[7] *E.g.*, Texas Traction Co. v. Barron G. Collier, Inc., 195 F. 65, 66 (5th Cir. 1912); Rahley v. Columbia Phonograph Co., 122 F. 623, 625 (4th Cir. 1903); both cited by this Court with approval in Meccano, Ltd. v. Wanamaker, 253 U.S. at 141.

II. The Decision Below Conflicts With Decisions Of Other Circuits In Ruling That An Applicant Must Make A "Clear Showing" Of Irreparable Harm In Order To Obtain A Preliminary Injunction And That The Applicant's Likelihood Of Success On The Merits Is Irrelevant.

The court of appeals' decision reversing the district court's grant of a preliminary injunction is in direct conflict with the decisions of at least three and, more likely, five other courts of appeals. It furthermore enlarges the disagreement and confusion already existing among the courts of appeals as to the proper standard to apply in determining whether a preliminary injunction should issue. This Court should rule upon this significant issue.

The court of appeals held that the preliminary injunction was wrongly granted solely because "Mobil has not shown that issuance of the [entitlements] notice will place it in a position which precludes ultimate recovery. . . ." App. A (4a). The court held that it was "unnecessary" for it to consider Mobil's likelihood of success on the merits because "this court finds that Mobil has failed to make a clear showing that it will suffer irreparable harm if an injunction does not issue." *Id.* Specifically, the court of appeals relied on Mobil's opportunity to try again to convince the Department of Energy to change its position and to provide an administrative means for Mobil to obtain relief. The court reached this conclusion despite the Department of Energy's repeated statements that it intends to terminate the Entitlements Program without action on, or further investigation of, its mismanagement of the Entitlements Program, as soon as it is no longer enjoined from doing so. The court of appeals did not disturb or even address the finding by the district court that Mobil would be without a remedy for wrongful payments if the Department of Energy refused to modify its position.

The rule so expressed is in conflict with the rules established by at least the Second, Ninth, and District of Columbia Circuits. While those circuits do not entirely agree among themselves, they do agree that it is not necessary for a party

that irreparable injury will inevitably occur in the absence of interlocutory relief. Rather, in those courts the movant need show only a "possibility" of irreparable injury, and that possibility is then one factor to be weighed with others, most particularly the likelihood of ultimate success on the merits and the effect of grant or denial of relief on other persons. *Charlie's Girls, Inc.* v. *Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973) (*per curiam*); *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980). The Ninth Circuit is quite explicit about the balancing effect (*id.* at 1201):

> In this circuit the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. [Citation omitted.] These are not separate tests but the outer reaches "of a single continuum." [Citation omitted.]

The test in two other circuits, the Seventh and Tenth, is more rigid, but still appears to conflict with the holding in the present case. The Tenth Circuit has held that a movant must demonstrate that there is a "probable danger" of irreparable injury, apparently without any balancing. *Lundgrin* v. *Claytor*, 619 F.2d 61, 63 (10th Cir. 1980). The Seventh Circuit requires a "balanc[ing of] the probability of ultimate success at the final hearing with the consequences of immediate irreparable injury *possibly* stemming from denial of the injunction." *Citizens for a Better Environment* v. *City of Park Ridge*, 567 F.2d 689, 690-91 (7th Cir. 1975) (Emphasis added).

In contrast, the Third, Fifth, and Sixth Circuits, most similarly to the court of appeals in the present case, impose an absolute requirement that the movant establish that it "will suffer" irreparable injury if preliminary relief is denied. *Continental Group, Inc.* v. *Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980) ("This Court has held that more than a risk of irreparable harm must be demonstrated. The requisite

for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury'. . . ."); *Foley* v. *Alabama State Bar*, 648 F.2d 355, 358 (5th Cir. 1981); *Gilley* v. *United States*, 649 F.2d 449, 454 (6th Cir. 1981).

Thus, there is very substantial conflict and confusion among the courts of appeals as to the proper standard to apply.[*] One author has referred to the preliminary injunction standards employed by the federal courts as a "dizzying diversity of formulations, unaccompanied by any explanation for choosing one instead of another . . . ." Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 526 (1978). While this Court has not to our knowledge ruled directly on the issue, it has stated its approval of a standard clearly at variance with that used by the court of appeals here. In *Brown* v. *Chote*, 411 U.S. at 456, this Court said in part (emphasis added):

> The issuance of the requested preliminary injunction was the only action taken by the District Court. In determining whether such relief was required, that court properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the *possibility* that irreparable injury would have resulted, absent interlocutory relief.

In addition to the fact that it extended the conflict among the courts of appeals, the decision in the present case further merits review because it is incorrect and exacts an unreasonably stringent standard for preliminary relief.

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[*] The Eighth Circuit, for example, recently was required to consider the issue *en banc* in order to clarify the standard to be applied by the district courts of that circuit in Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109 (8th Cir. 1981) (*en banc*). That court noted, "[w]e apprehend that in recent years some misunderstanding of that standard has developed. We recognize that language in some of our recent opinions may have contributed to uncertainty as to the appropriate test or tests." *Id.* at 112. *See also* Blackwelder Furn. Co. of Statesville, Inc. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977) (reversing a district court's denial of a preliminary injunction because the lower court mistakenly applied an appellate court standard not a trial court standard. *Id.* at 193-94).

It is the essence of preliminary relief that it is sought early in litigation, usually to preserve the status quo, when there is need for rapid decision and the parties' factual and legal presentations are incomplete. For that reason, a movant is not required to prove his case in full at a preliminary injunction hearing. *University of Texas* v. *Camenisch*, 101 S. Ct. 1830, 1833 (1981). It is universally recognized and each of the court of appeals' decisions cited above (at 12-13) states that a movant for preliminary relief need show only a likelihood of success on the merits.

It is utterly inconsistent with this rationale to require, as did the court of appeals here, a movant to show in every case that in no conceivable circumstances would he not suffer irreparable injury if relief is denied.[9] At least two courts have specifically recognized that any showing — including irreparability of injury — required for a preliminary injunction cannot be

[9] There would appear to be two possible explanations why some courts might have required a clear showing of irreparable injury. First, as a practical matter in many cases there is no question of the irreparability of the harm that will be suffered if relief is denied. Some courts may have become accustomed to the ease with which a significant number of parties have been able to make the showing. In many cases, however, the irreparability of injury may not be clear at the preliminary injunction stage. As we have urged, it is illogical in such cases to require the movant to show irreparable injury to a certainty at an early stage.

Second, there appears to be at least some confusion arising from the fact that irreparable injury — or, more correctly put, an injury without an adequate remedy at law — was a jurisdictional prerequisite of equity relief. *See* Laycock, Book Review, "Injunctions and the Irreparable Injury Rule," 57 Tex. L. Rev. 1065, 1070-71 (1979). But that should not be a problem with invocation of *preliminary* equitable relief. In any event, the court of appeals has not suggested here that Mobil could obtain any relief at law; all the remedies suggested as not impossible by the court of appeals are equitable and administrative. The sole importance of a showing of the likelihood of irreparable injury in the present case is the weighing of equitable factors to determine whether in the district court's proper exercise of discretion preliminary relief was warranted.

absolute because of the interlocutory stage at which the question must be decided. *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 742-43 (2d Cir. 1953) (Frank, J.); *Perry* v. *Perry*, 190 F.2d 601, 602 (D.C. Cir. 1951) (Bazelon, J.).

This case shows how the lack of a consistent standard among the courts of appeals permits individual courts to pick one of the existing formulations and to pursue it to an illogical conclusion. Here the district court held, and the court of appeals did not disagree, that if the Department of Energy were to end the Entitlements Program as it now plans by simply issuing the final lists as soon as it is free to, Mobil will have no mechanism to invoke in order to seek a remedy. Nor did the court of appeals disagree with the district court's conclusion that the DOE has failed to act over the four years that it has known of the distortion of the program by "disappearing" price-controlled crude oil, and that it is unlikely to act. Indeed, the court of appeals joined in the criticism of DOE for its inaction. App. A (6a-7a). Instead, the court of appeals held that Mobil had not shown irreparable injury because the DOE *might* act to create a mechanism by which relief could be sought. App. A (4a). Thus, the reversal of the district court's grant of a preliminary injunction was based on a holding not that Mobil had a route to pursue to obtain relief, but rather that the DOE might give it one. This holding, we submit, is far more severe than those of other courts, because the future availability of any of these avenues is not known and cannot be known now, and at this preliminary stage of the litigation it is decidedly unfair to deny Mobil relief *pendente lite* on the possibility that one may become available.

That is particularly so because Mobil has made a strong showing on the other factors that should be weighed with its showing on irreparable injury. The district court concluded (without question from the court of appeals) that Mobil has a strong likelihood of success on the merits. The district court held that DOE had mismanaged the Entitlements Program and refused to correct that mismanagement, that a number of refiners had been able to take advantage of the flaws in the

program by manipulating their inventories to avoid reporting their receipts of price-controlled crude oil, that these acts had already cost those refiners who had not manipulated inventories $5.6 billion. Both the district court and the court of appeals criticized the DOE in unusually strong terms for its inaction in the face of a serious problem. The district court found that Mobil has already been wrongly forced to pay $284 million into the program and that publication of the final entitlements list, as DOE intends to publish it, would wrongly require Mobil to pay an additional $50 million. The district court also held (again without any question from the court of appeals) that preliminary relief would not injure the DOE or third parties.[10]

[10] The DOE introduced no evidence before the district court on this or any other point.

In an unusual development, the Tosco Corporation, without even attempting to appear before the district court, asked the court of appeals for a writ of mandamus that would have forbidden the district court to grant preliminary relief. Tosco submitted an affidavit in support of that petition. The court of appeals dismissed the petition on June 9, 1981, although it permitted Tosco to intervene in the appeal. App. D (89a). It is unclear whether Tosco's affidavit, which was filed as part of the mandamus action that was dismissed, is in the record of this case, but in any event it should not be considered since it was not submitted to the district court first. In a companion case dismissing a similar writ simultaneously sought by Tosco, the court of appeals faulted Tosco for not first appearing and presenting its claims before the district court, Tosco v. Eubanks, No. 10-35 (TECA August 14, 1981), slip op. at 3, and it would obviously be irregular and wrong to judge the correctness of the district court's action on the basis of the evidence that was intentionally not submitted to it. In any event, the Tosco affidavit shows no more than temporary loss of money, which does not amount to irreparable injury. Sampson v. Murray, 415 U.S 61 (1974).

We also submit that Tosco should not be permitted to participate in this Court. The court of appeals seriously erred in permitting Tosco to intervene, since as the court of appeals itself later held in Tosco v. Eubanks, Tosco had no excuse for its failure to appear in the district court. Thus, its intervention in the court of appeals was emphatically untimely. *Cf.* Rule 24(a) and (b), Fed. R. Civ. P. It will encourage evasion of parties' responsibilities to raise their claims as

With respect to irreparable injury, the district court noted that the monthly entitlements lists are the only means the Department of Energy had to correct errors made in its prior administration of the program, and that apart from issuance of such lists, there exists no means to redress such errors. App. B (78a). The Department of Energy neither pays nor receives funds under the Entitlements Program; rather, it orders refiners to pay huge sums to other refiners. There is no DOE regulation that permits, and no precedent for, one refiner to make any judicial claim against another for over- or underpayment of entitlements obligations. The district court also held — and the DOE's attempts to defeat stay of the court of appeals' mandate underscore — that the DOE will issue the final list or lists (*see* note 13, *infra*) as soon as possible if the preliminary injunction is lifted. This will permit those refiners who have manipulated their inventories to increase and consolidate the improper advantage they have taken. It will also leave Mobil without any mechanism of redress to regain its losses even assuming that Mobil's claim of injury is sustained.

The three routes suggested by the court of appeals as possibly providing courses through which Mobil could obtain relief are, to put it mildly, weak reeds. DOE may unilaterally defeat all of them.[11] The court of appeals held: first, that DOE might

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soon as possible if Tosco, which disdained to appear in district court, is permitted to appear as a party in this Court arguing that the district court was wrong.

With respect to the effect of the injunction on third parties, there were also a number of briefs *amicus curiae* filed by small refiners in the court of appeals containing statements of counsel which are of course non-evidentiary. Moreover, most of the *amici* supported Mobil's position.

[11] For this reason the court of appeals' reliance on Sampson v. Murray, 415 U.S. 61 (1974), was entirely misplaced. There this Court held that adequate relief could be had without an injunction because the Pay Administration Act, *as amended*, 5 U.S.C. § 5596 (1980), provided a means of compensation for temporary loss of employment. 415 U.S. at 90-91. Here, by contrast, no such route to obtain relief will exist after the final lists, now enjoined, are issued. The court of appeals has held that Mobil's injury is not irreparable because it is possible that DOE will create a remedy.

still rule on an emergency petition for rulemaking filed by Mobil seven months ago, on February 10, and concerning which DOE has done absolutely nothing; second, that Mobil might sue to overturn the decision in which the DOE's Office of Hearings and Appeals held that it lacked jurisdiction to order relief;[12] and third, that Mobil might administratively "appeal" the publication of final regulations governing the so-called "clean-up" entitlements list. App. A (5a).

None of these possibilities provides any assurance that a mechanism to obtain ultimate recovery would exist to provide relief should Mobil prevail on the merits. It is DOE's official position (although Mobil would not agree) that the Office of Hearings and Appeals lacked jurisdiction over the merits of Mobil's claim. The court of appeals offered only the possibility that Mobil might initiate a judicial challenge of that position; the court did not comment on Mobil's chance of success in overcoming DOE's interpretation of its own internal delegations of decision-making power. In any event, DOE could formally change those delegations to defeat OHA's jurisdiction definitively. The first and third of the court's suggestions amount to nothing more than the possibility that DOE may yet change its mind.[13] Given the fact that the district court and

[12] Since DOE itself appeared and argued before the Office of Hearings and Appeals that OHA lacked jurisdiction, it will not lie in the government's mouth to suggest that such a suit might be successful.

[13] After oral argument in the court of appeals, DOE promulgated in final form the "clean-up" regulations discussed by the district court at App. B (78a-79a). Under these regulations, after a so-called clean-up list that will reflect some corrections to prior reports (which DOE now says that it will publish very shortly after the mandate issues), DOE as an agency would no longer act on entitlements disputes but would leave them to the courts to settle. DOE then argued by letter to the court of appeals that these new regulations did provide the avenue for relief that Mobil was seeking. Mobil responded by letter (*see* App. G (129a-134a)), arguing that the constitutionality of the mechanism set up by the new regulations was highly doubtful at best because it sought to have litigation between a complaining party and DOE be binding on all refiners regardless of whether they were or could have been parties, and also because the regulations assumed

the DOE's own quasi-independent hearing authority, the Office of Hearings and Appeals, in a passage quoted with approval by the court of appeals itself, have strongly criticized DOE for its inaction and its self-fostered ignorance about the disappearing price-controlled crude oil, the possibility that DOE will finally do something voluntarily to create a route for relief must be regarded as remote. Clearly, if the agency does not change its stated intention to terminate the Entitlements Program as soon as possible, Mobil will suffer irreparable injury that could not be rectified even if Mobil ultimately prevails on the merits.[14]

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the existence of (or tried to establish) the right of private federal court actions between refiners to settle entitlements disputes — a cause of action for which there is no precedent and which the district court found (App. B (78a)) did not exist. Mobil also showed that even if such lawsuits could be maintained, there would be thousands of such actions over this dispute alone as those refiners that had been injured sought to find and fasten liability on those refiners that had unfairly profited by inventory manipulation. There are about 300 refiners in the United States.

The court of appeals did not agree with DOE that this "clean-up" mechanism provides a remedy for Mobil. Rather, the court in a brief phrase summarized the content of the rule and told Mobil that it could "appeal" the issuance of the final regulations under 5 U.S.C. § 553. App. A (6a). (The DOE regulation cited in the court's opinion, 10 C.F.R. § 205.160, merely provides that 5 U.S.C. § 553 applies.) Of course, section 553 does not provide for an appeal in the commonly understood sense of asking a higher authority to review the decision of a lower. All it provides, in section 553(e), is the right to petition an agency to "issue, amend, or repeal a rule." Since Mobil has had a petition for rulemaking seeking the identical result pending since February 10, it is unlikely in the extreme that the "appeal" of the "clean-up" regulations will bring Mobil anything more than the DOE inaction that its February 10 petition for rulemaking has brought.

[14] In the court of appeals, the government took as its primary position that the courts lack the power to require an agency to issue any change in its regulations that the agency in its discretion refuses to is-

None of these alternatives amount to more than an inchoate and bare chance that DOE will change its position and decide to provide a route to obtain relief. There is a high likelihood that DOE will continue to refuse to act and that, therefore, the injury that Mobil will suffer if the preliminary injunction is vacated will be in fact irreparable. It is most likely, moreover, that when weighed under a different, and, we believe, more appropriate standard, the decision of the district court granting preliminary relief would be affirmed.

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sue. Brief of Appellants, TECA No. 2-35, filed June 12, 1981, at 9-16. The government stated in part (*id.* at 11):

> If there has been manipulation [by some refiners] of the [Entitlements Program] regulations, the loopholes can be closed only by issuing a regulation, and the authority to write regulations was given solely to the Secretary in § 4(a) of the [Emergency Petroleum Allocation Act]. 15 U.S.C. § 753(a).

The court of appeals apparently accepted (and at least did not contradict) this view. Thus, for all that appears, if the DOE continues to fail and refuse to modify its regulations to provide an avenue for relief, Mobil will be left without any remedy at all.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 11, 1981

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals were served this 11th day of September, 1981, on each of the following by hand:

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Appendix

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Office-Supreme Court, U.S.
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81-499

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, JAMES B. EDWARDS, SECRETARY OF ENERGY, AND TOSCO CORPORATION,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

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APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 2-35

MOBIL OIL CORPORATION, PLAINTIFF-APPELLEE,

—against—

UNITED STATES DEPARTMENT OF ENERGY AND JAMES B. EDWARDS, SECRETARY, DEFENDANTS-APPELLANTS.

Appeal from the United States District Court for the Northern District of New York

(No. 81 Civ. 340)

Argued: June 17, 1981 Decided: August 7, 1981

Judgment entered: August 14, 1981

APPEARANCES

DANIEL JOSEPH, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C. (R. Bruce McLean, Harry R. Silver, Joseph T. Casey, Jr. and David A. Holzworth; Charles S. Lindberg, William C. Streets and Gail F. Schultz, Mobil Oil Corporation, Fairfax, Virginia, on the brief), for Plaintiff-Appellee Mobil Oil Corporation.

Kenneth L. Bachman, Jr., Cleary, Gottlieb, Steen & Hamilton, Washington, D.C. with whom Sara D. Schotland, Eugene M. Goott and Mark N. Duvall, were on the brief for Intervenor Tosco Corporation.

David W. Caruthers, Of Counsel, on the brief for *Amicus Curiae* Crown Central Petroleum Corporation, Baltimore, Maryland; Richard P. Noland and Robert R. Morrow, Sutherland, Ashbill & Brennan, Washington, D.C., on the brief for *Amicus Curiae* Texas City Refining, Inc.; Karen S. Bedell and Jamie Replogle, Shank, Irwin, Conant, Williamson & Grevelle, Washington, D.C., on the brief for *Amicus Curiae* Hunt Oil

Company, and Edwin Jason Dryer and Michael R. Bromwich, Foley, Lardner, Hollabaugh & Jacobs, Washington, D.C., on the brief for *Amicus Curiae* Independent Refiners Association of America.

NANCY C. CRISMAN, United States Department of Energy, Washington, D.C. (Thomas H. Kemp, Samuel Soopper, Marcia Sowles and Robert C. Powers, on the brief), for Defendants-Appellants.

Before METZNER, MAXWELL and LACEY, Judges.

METZNER, Judge.

The Department of Energy (DOE) appeals from an order of the United States District Court for the Northern District of New York (Munson, J.), granting Mobil Oil Corporation (Mobil) a preliminary injunction enjoining DOE from issuing any further Entitlements Notices and from requiring Mobil to comply with any such notices.

The court found that Mobil would suffer irreparable harm if DOE is permitted to issue their Entitlements Notice covering the period January 1-28, 1981.

The Entitlements Notices which were enjoined are an integral part of the Entitlements Program (Program). That Program was created to maintain equitable distribution of price-controlled crude oil throughout the petroleum industry. The Program was a necessary procedure to cure imbalances resulting from the imposition of price and allocation controls on petroleum products under the Emergency Petroleum Allocation Act (EPAA).

For a detailed discussion of the Program, see *Cities Service Co.* v. *Federal Energy Administration*, 529 F.2d 1016 (TECA 1975), *cert. denied*, 426 U.S. 947 (1976), and *Pasco, Inc.* v. *Federal Energy Administration*, 525 F.2d 1391 (TECA 1975).

As the extreme energy crisis passed, many aspects of the price and allocation regulations were put on standby status. Finally, on January 28, 1981, President Reagan signed an Executive Order directing immediate decontrol of all remain-

ing crude oil and refined petroleum products, and revoking all regulations governing those products. Executive Order 12287, 46 Fed. Reg. 9909 (1/30/81).

However, that order specifically provided that the Secretary of Energy "may . . . adopt such regulations and take such actions as he deems necessary to implement this Order, including the promulgation of entitlements notices for periods prior to this Order and the establishment of a mechanism for entitlements adjustments for periods prior to this Order."

As of the date of the Executive Order, entitlements notices for December 1980 and January 1-28, 1980, had not yet been issued.

Mobil offers data gleaned from reports furnished to DOE (10 C.F.R. § 211.66) to argue that large quantities of price-controlled crude oil have "disappeared" from the Entitlements Program due to refiners' manipulation of these regulations. Mobil asks that DOE be prevented from finalizing the obligations of the participating refiners under the program until all price-controlled crude oil is accounted for.

An "entitlement" in essence is a license to refine a barrel of price-controlled crude oil. Each month each refiner is given a number of entitlements equal to the National Domestic Crude Oil Supply Ratio (DOSR) multiplied by the volume of crude oil runs-to-stills reported by the refiner in that month. 10 C.F.R. § 211.67(a)(1). The DOSR is computed, also on a monthly basis, as the ratio of all refiners' reported receipts of price-controlled crude oil to all refiners' crude oil runs-to-stills. 10 C.F.R. § 211.62. If a refiner's reported receipts of price-controlled crude oil exceed the number of entitlements received under the above formula, a sufficient number of entitlements must be purchased by the refiner to cover the excess. If a refiner's reported receipts of price-controlled crude are less than the number of entitlements designated to the refiner by DOE, then that refiner must sell the excess entitlements. 10 C.F.R. § 211.67(b),(c).

DOE also sets the price of the entitlements to be purchased and sold. It does not match up buyers with sellers. The agency merely assigns the obligation to buy or sell entitlements and leaves it to the refiners to comply. Historic trading relationships have arisen between refiners who are traditionally in the position of buying entitlements and those who must traditionally sell entitlements.

The notices are published within about two months of the subject month, and may include adjustments for errors, exception relief or recertification as determined by DOE.

It is unnecessary to review the merits of Mobil's explanations of how it sustains the contentions it advances. This court finds that Mobil has failed to make a clear showing that it will suffer irreparable harm if an injunction does not issue. *Triebwasser & Katz* v. *American Telephone & Telegraph Company*, 535 F.2d 1356, 1359 (2d Cir. 1976).

Mobil has not shown that issuance of the notice will place it in a position which precludes ultimate recovery, through judicial or administrative proceedings, of losses allegedly traced to previous erroneous entitlements notices.

The standard for determining whether a party has shown irreparable injury is founded upon the court's ability to ultimately grant an effective remedy. The traditional standard is set forth in *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1921), where the court said:

> "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."

Temporary loss of income, recoverable upon successful termination of the litigation, will not usually constitute irreparable injury. *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974).

There are at least three avenues of administrative relief available to Mobil. On February 10, 1981, Mobil petitioned DOE's Economic Regulatory Administration (ERA) to institute a rulemaking proceeding to amend the entitlements regulations to account for all price-controlled crude oil. ERA has not yet acted on this petition.

On March 12, 1981, Mobil appealed its obligations under the Entitlements Notice covering December 1980 to the Office of Hearings and Appeals (OHA), alleging the same defects as claimed in the instant litigation, and asking that the December Notice be remanded to ERA for recalculation. An interlocutory order issued on June 4, 1981 (46 Fed. Reg. 32661 (June 24, 1981)), proposed that ERA be required to gather information from each refiner to ascertain how much price-controlled crude oil has disappeared from the program. However, on July 8, 1981, subsequent to the argument of the appeal before this court, OHA determined that it lacked jurisdiction to hear the appeal because Mobil in effect was seeking an amendment to the rules. This order of OHA is a final order subject to judicial review.

Subsequent to the argument of this appeal, ERA issued a Final Rule to comply with the suggestion of the Executive Order that a mechanism be established to adjust entitlements obligations for periods prior to decontrol. 10 C.F.R. § 211.69, added July 9, 1981, 46 Fed. Reg. 36092, July 13, 1981. The rule provided for a final "clean-up" list, effectively ending the Entitlements Program; and for a self-executing mechanism intended to account for judicial and administrative determinations made after the August 15, 1981 reporting date for the final list. If Mobil is dissatisfied with this Final Rule, it is free to file an administrative appeal from this rule making. 10 C.F.R. § 205.160(b); 5 U.S.C. § 553.

Thus it is clear at this writing that Mobil has remedies which will give it an opportunity to have its claims reviewed and adjudicated. There is no conceivable reason why established and orderly procedures should be bypassed. Furthermore, the

nature of the claim and the proof are more appropriately considered in the first instance by the administrative agency.

There is, of course, a time problem in view of the expiration on September 30, 1981, of the statutory authority for the control program. 15 U.S.C. § 760g. The court is mindful of the savings clause in that statute. However, at this point we are not prepared to discuss the scope of that clause.

The court is aware of prior situations in which the agency seems to have been slow in discharging its functions. *E.g., Marathon Oil Co.* v. *Department of Energy*, 642 F.2d 436, 439 (TECA 1981). We express the hope that this matter will be expeditiously disposed of because of the nature of the claims made by Mobil.

The important nature of the problem raised by Mobil is attested to by OHA, a division within DOE, with expertise in this area. In its opinion of July 8, 1981, referred to above, it made the following observations:

> "Based upon our review of the entire record in this proceeding we conclude that the problems and issues presented by Mobil are matters of great significance to the Entitlements Program and should be carefully considered by the appropriate officials of the Department of Energy (DOE)." (p. 1)
>
> "Although we have in essence no jurisdiction to grant Mobil's appeal, we do find that Mobil has raised serious questions concerning ERA's administration of the Entitlements Program." (p. 19)
>
> * * * * *
>
> ". . . we are particularly disturbed that such a dispute exists nearly one-half year after decontrol. . . . Although ERA has attempted to discredit Mobil's method of quantitative analysis of the evidence, the ERA apparently lacks knowledge of the degree to which upstream stockpiling of crude oil and the use of time exchanges in-

creased towards the end of the program as Mobil alleges. Moreover, as far as we know, ERA has shown no inclination to obtain such knowledge." (pp. 19-20)

* * * * *

". . . we believe it incumbent upon ERA to attempt to exercise its broad rulemaking discretion in an informed and rational manner consistent with the President's Order and the relevant statutory objectives." (p. 20) (Footnotes omitted.)

With the finding that Mobil has failed to show irreparable harm, we need not reach the question of the construction of Section 211 of the Economic Stabilization Act as to the permissible scope of the injuction.

The order is reversed and the motion for a preliminary injunction is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

81-CV-340

MOBIL OIL CORPORATION,

Plaintiff.

VS.

DEPARTMENT OF ENERGY AND
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Memorandum-Decision

FILED
JUNE 3, 1981

I.

Presently before the Court are two motions — the first has been made by the plaintiff Mobil Oil Corporation (Mobil) to enjoin the issuance by the defendants Department of Energy and Secretary James B. Edwards (hereinafter collectively referred to as DOE) of the "January entitlements notice." *See* 10 C.F.R. § 211.67(i) (1980). The second motion has been made by the defendants to dismiss plaintiff's complaint. Briefly, the entitlements notice is an essential component of the DOE's entitlements program, which is designed to equalize the access of domestic refiners to price-controlled domestic crude oil. *See Pasco, Inc.* v. *Fed. Energy Admin.*, 525 F.2d 1391, 1395 (TECA 1975). This is accomplished by requiring cash transfers (entitlements) to be made from those domestic refiners with a proportionately greater access to price-controlled crude, to those refiners less fortunately situated. A corresponding "entitlements notice" is then published every month reflecting each refiners' entitlements obligation under the program.

To function properly, the entitlements program depends in no small measure on the accurate report of a refiner's "receipts" of price-controlled crude oil. The instant suit grows out of plaintiff Mobil's claim that there are in fact widespread abuses in reporting such "receipts" by refiners. Mobil contends that as a result of this misreporting, it has had to bear a disporportionate share of entitlements obligations. Accordingly, Mobil moved for temporary and preliminary injuctive relief to prevent the DOE from issuing its "January entitlements notice," which allegedly would have immediately required Mobil to shoulder an inequitable share of entitlements obligations. This Court granted Mobil's request for a temporary restraining order on April 21, 1981, and enjoined the DOE "from issuing any further entitlements notices and

from requiring Mobil to comply with such notices." The temporary restraining order was to remain in effect for twenty days. *See* Memorandum-Decision and Order; dated April 21, 1981, at p. 6.

In the meantime, the DOE moved to dismiss plaintiff's complaint. The DOE maintains that pursuant to the doctrine of primary jurisdiction, this Court should defer consideration of the instant case, until the DOE has had an opportunity to complete its own investigation of the merits of Mobil's claims. The Court is informed by the DOE that it is currently investigating the problem of misreporting, but has not as yet completed this investigation. For similar reasons the DOE additionally argues that plaintiff has failed to exhaust administrative remedies, and that the instant dispute is not ripe for judicial resolution. Furthermore, the DOE asserts that even assuming arguendo that plaintiff has satisfied these legal doctrines, it has neither stated a claim nor demonstrated that it will suffer irreparable injury, should the DOE issue the "January entitlements notice."

A hearing on plaintiff's preliminary injunction motion was held on May 12, 1981 and live testimony was taken on the issues of misreporting in the DOE's entitlements program, and the likelihood that plaintiff will suffer irreparable harm if the "January entitlements notice" is released. That same day the Court also heard the parties' arguments with regard to the DOE's motion to dismiss plaintiff's complaint. To fully understand the merits of both pending motions, a more detailed examination of the entitlements program is in order.

II.

Constrained by the Arab oil embargo and dwindling domestic production, the supplies of crude oil in the United States decreased dramatically in 1973. The combined affect of these factors caused severe increases in the price of oil and related products. *See* 39 Fed. Reg. 31650 (August 30, 1974). To soften the economic hardships associated with reduced supplies and higher prices, the Cost of Living Council created a

price control system for crude oil as a part of Phase IV, *see former* 6 C.F.R. Part 150, Subpart L, 38 Fed. Reg. 22536 (August 22, 1973), of the Stabilization Program. *See* the Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. §1904 note. The system was designed to control the prices of petroleum from the wellhead to finished products, and to create a price incentive to encourage the production of additional quantities of domestic crude.

Under the regulations a "base production control level" (BPCL) was established for each domestic crude oil producing property, equal to the volume of production from that property during each month of 1972. Production levels for the property up to the amount of the BPCL in the corresponding months of any subsequent year had to be sold at a price no higher than a regulatory ceiling price. This crude oil was referred to commonly as "old oil." If the property produced crude oil in excess of the BCPL, the additional quantities or "new oil" could be sold at the higher world market price. *See* 10 C.F.R. § 212.72 (1980). Also exempt from price controls, and consequently saleable at world market prices, were all imported oil and crude oil produced from marginal or "stripper" wells. *See* 10 C.F.R. §§ 212.15-16 (1980). At the same time, refinery prices for selected petroleum products were also controlled by regulations. By their terms, refiners were required to establish base prices for each controlled product at their May 15, 1973 price levels, but were permitted a certain degree of price allowance for the increased costs of imported or domestic crude oil from which these controlled products were refined. *See* 10 C.F.R. §§ 212.81-85 (1980).

While the end of the Arab oil embargo in 1974 led to replenished supplies of imported crude oil, the overall price of foreign crude increased significantly. This price increase widened the disparity between the controlled price for "old oil" and the market price of "new oil," and was reflected in the costs and therefore the relative prices charged by refiners. *See* 39 Fed. Reg. 31650 (August 30, 1974). However, refiners with greater access to the less expensive price-controlled

crude oil — typically the larger integrated refiner — has a cost advantage over those of their competitors who could only secure supplies of uncontrolled crude oil — usually the small or independent refiners. Thus, at a time when increased supplies of crude oil made the market place much more sensitive to price considerations, the economic viability of these small and independent refiners was being threatened. Moreover, consumers in various parts of the country who depended primarily on stocks of uncontrolled crude oil ("new oil," imported and "stripper" crude oil) contended with much higher prices than other regions with ready access to crude oil that was price-controlled.

In an effort to eliminate the inequities in the refining and marketing sectors of the petroleum industry without sacrificing the beneficial elements of the two-tier price system, the Federal Energy Administration (FEA), the immediate predecessor of the DOE, proposed and adopted the entitlements program. *See generally* 10 C.F.R. §§ 211.66-67 (1980); Transcript of May 12, 1981 hearing at p. 31 (hereinafter Tr. at p.____). As reflected in its legislative history, the primary purpose of the entitlements program was the equitable distribution of price-controlled crude oil throughout the petroleum industry:

> In large measure, the goal of the proposal is to improve the access of small and independent refiners to old domestic oil. In addition, however, the proposed program is also designed effectively to provide all refiners with proportionate amounts of old oil, based on their relative refinery capacities. The proposed program is accordingly aimed not only at bringing the small and independent refining sector as a class into a more competitive position with respect to the majors, but it is also specifically designed to assure that all segments of the petroleum industry will benefit equally from lower-priced domestic oil. Thus, the FEA anticipates that in some cases, major oil companies (with a low level of old oil supplies) will benefit by the program, while some small refiners (with a high level of old oil supplies) may be required to buy entitle-

> ments under the program. This goal is consistent with the Congressional objectives of achieving equitable prices among all sectors of the petroleum industry and preserving an economically sound and competitive petroleum industry.

39 Fed. Reg. 31650 (August 30, 1974).

Toward these ends, the FEA rejected the option of actual physical reallocation of crude oil among refiners, in favor of monthly cash payments to refiners with relatively less access to price-controlled crude oil than the national average, from refiners with proportionately greater access. *See* Tr. at p. 32; and 10 C.F.R. § 211.67(b) (1980). These entitlements obligations are costed into the price of crude oil, *see* 10 C.F.R. § 211.67(m) (1980), and then adjusted into the maximum lawful price for the following month. *See* 10 C.F.R. § 212.83(c)(2) (1980). *See generally, Pasco, Inc.* v. *FEA*, 525 F.2d 1391, 1395 (TECA 1975); *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (TECA 1975). A description of the mechanics of the entitlements program follows.

Under the provisions of the entitlements program, each refiner must report on a monthly basis, *inter alia*, its crude oil runs to distillation units, as well as the price, volume, and type of all crude oil booked into the refinery as a "receipt." See 10 C.F.R. § 211.66 (1980). These reports are due approximately two months after the report subject month. *Id.* Based on the information gleaned from these reports, every eligible refiner is issued a number of entitlements for the month. An entitlement is a "license" to refine one barrel of price-controlled crude oil for the month. *See* 10 C.F.R. § 211.62 (1980).

To determine a refiner's monthly allocation of entitlements, the formula — vastly simplified — is as follows: the national domestic supply ratio (DOSR), which is the ratio of price-controlled crude to the national total runs to stills, is multiplied by the volume of crude oil runs to stills reported by the refiner for that month. *See* 10 C.F.R. § 211.67(a)(1) (1980). A refiner is then issued entitlements equal to the

above computed figure. The second step in determining the refiner's ultimate entitlements obligation is to calculate the monthly receipts of "deemed old oil." *See* 10 C.F.R. § 211.67(b)(2) (1980). This sum represents a refiner's total receipts of price-controlled crude oil. A refiner's entitlements position is the difference between its entitlement allocation and deemed old oil receipts. If the entitlements allocation is greater than a refiner's deemed old oil receipts, the refiner will be able to sell entitlements. Whereas, if the entitlements allocation is less than a refiner's deemed old oil receipts, it will have to purchase additional entitlements from a refiner that is in a position to sell entitlements, in order to process those additional supplies of price-controlled crude. *See* 10 C.F.R. §§ 211.67(b)-(c) (1980).[1] The regulations do not match up entitlements purchasers and sellers every month for the purpose of making these transactions. Instead, historic trading rela-

[1] Imagine a system with only two refineries, each of whom runs 100 barrels of crude. Refinery A has only price-controlled crude at a value of $8.00 a barrel and Refinery B has only uncontrolled crude at $38.00 a barrel. Now, in this particular example the supply ratio that I am speaking of would be 100 barrels of price-controlled crude divided by 200 barrels of runs or fifty percent.

The entitlement price would be the difference between the $38.00 uncontrolled price and the $8.00 old oil price or $30.00 for each entitlement. When the entitlements list were issued it would be seen that Refiner A would require 100 entitlements, he would only have been issued fifty. Therefore, he would have to buy fifty entitlements from Refiner B at a cost of $30.00 for each entitlement and when these transactions are finished you would find through arithmetic that Refiner A's average crude cost . . . would have gone up $15.00 a barrel to a total of $23.00 a barrel whereas Refiner B's average crude cost would have gone down $15.00 per barrel from $38.00 and would also be at $38.00 and you can see that we have in effect allocated the benefits of price-controlled equitably.

Testimony of Roy K. Murdock, General Manager of Crude Oil and Gas Liquids for Mobil Oil Corporation's United States Marketing and Refining Division. Tr. at pp. 33-34.

tionships have evolved in the industry. The price of an entitlement, however, is set by regulation, and is determined by subtracting from the weighted average cost of a barrel of uncontrolled crude, the weighted average cost of a barrel of "old oil." *See* 10 C.F.R. § 211.67(i)(4) (1980). [2]

Every month the DOE publishes an entitlements notice "evidencing the issuance of entitlements" and containing the following information: The DOSR, the name of each refiner to which entitlements have been issued, the number of barrels of deemed old oil included in each refiner's adjusted crude oil receipts, the number of entitlements issued to each refiner, the number of entitlements required to be purchased or sold by each such refiner, and the price at which entitlements shall be purchases and sold. *See* 10 C.F.R. § 211.67(i)(2) (1980). A refiner's failure to comply with the obligations imposed by the entitlements notice or the entitlements program in general, is subject to civil liability of $20,000 per day for each day of non-compliance, and criminal sanctions of imprisonment for one year and a fine of $40,000 per day for each day of non-compliance. *See* 15 U.S.C. § 754; 10 C.F.R. §§ 205.203(a)(2), (b)(1)(A), (c)(1)(B).

Two final points on the operation of the entitlements program must be made. The first is that although the entitlements program is operated on a monthly basis, a given month's entitlements notice does not reflect a "freeze-frame" picture of the refinery industry for that month. As a primary matter, the entitlements notice itself is issued two months after the subject month it reports about. Secondly, such factors as errors in reporting, recertifications of crude oil, adjustments in crude oil receipts and costs, and exception relief granted by the DOE's Office of Hearings and Appeals, inject a degree of inaccuracy in each month's entitlements notice. Yet, over the course of the program these discrepan-

[2] In other words, "The price of entitlement was, in effect, the economic benefit of access to price-controlled oil." Murdock testimony, Tr. at p. 33.

cies are supposed to be accounted for, and correction lists are issued accordingly. *See* Tr. at p. 46, and Plaintiff's Exhibit #2(y).

It should also be noted that the entitlements program has been amended several times over the course of its life.[3] Some of these amendments were to further advance the goal of equitable distribution of price-controlled crude oil. Still other changes have been for the purpose of granting subsidies to various sectors of the petroleum industry. For example, the deemed old oil computation was necessitated by a change in the program that added an "upper" tier of price-controlled crude oil, and redesignated "old oil" as "lower" tier.[4] It will be recalled that the original form of the entitlements program only included the one category of "old oil." Perhaps most affected by the changes in the entitlements program's directions, especially in the area of subsidies, has been the DOSR calculation. The DOSR now incorporates different types of subsidies, which are provided in the form of additional allocations of entitlements for the following programs: small refiner "bias," exceptions and appeals relief in the entitlements program, California heavy crude refining incentives, for the import of naptha into Puerto Rico, for the import of residual fuel oil into the East Coast refining district, synthetic fuel development, domestic residual fuel deductions, and for crude oil sold to the Strategic Petroleum Reserve. The effect of

[3] *See generally* "Validation of the Crude Oil Entitlements Information System," study prepared for the DOE by Tera, Inc., dated March 9, 1981 [hereinafter Validation Study]; Appendix C "History of the Entitlements Program;" Attachment F-1 "The Domestic Crude Oil Entitlements Program Calculations." Upon Mobil's motion and over the DOE's claim of executive privilege, the Court ordered the DOE to release this study for purposes of the instant litigation. *See* this Court's May 15, 1981 Memorandum-Decision and Order.

[4] Today, the deemed old oil calculation also factors in the weighted average cost of upper tier Alaska North Slope crude oil. *See* 10 C.F.R. § 211.67(b)(2) (1980).

these program modifications has been to reduce the size of the DOSR. As shall be explained in greater detail momentarily, a lower DOSR causes fewer entitlements to be issued to all refiners, and therefore increases their proportionate burden under the program. In addition, a lower DOSR furthers the likelihood that even some traditional entitlements sellers will become entitlements purchasers.[5] *See infra* at pp. 14-15. With this examination of the purpose, evolution, and operation of the entitlements program complete, the Court turns to consider the factual predicate for Mobil's assertion that a preliminary injunction should issue against the DOE's "January entitlements notice."

III.

Due to the cost differential between a barrel of price-controlled and uncontrolled crude oil, there was always a financial incentive in the petroleum industry to find methods, whether legal or extra-legal, to "convert" price-controlled crude oil into uncontrolled crude oil. A refiner that could make a barrel of price-controlled oil — selling, for example, at $8.00 a barrel, "disappear" and then later "reappear" as uncontrolled crude oil — selling, for example, at the world market price of $38.00 a barrel, would stand to make a tidy profit of $30.00 on each barrel sold. Mobil asserts that the phased, and more recently, the complete decontrol of the petroleum industry has provided even additional financial incentive to cheat or "game" the price-control regulations. Some additional background on decontrol is necessary.

On April 5, 1979 President Carter announced his intention to deregulate all domestic crude oil. Soon thereafter, the DOE took steps to implement the President's decision, and it adopted the first of a series of amendments to its regulations, with a view towards gradually lifting the price-controls on domestic crude-oil by October 1, 1981. *See* 44 Fed. Reg. 66187 (November 19, 1979). The plans for phased decontrol, how-

[5] Validation Study, Attachment F-1 at p. F-42.

ever, were interrupted by a change in presidential administrations. Shortly after being sworn into office, President Reagan fulfilled one of his campaign pledges by issuing Executive Order No. 12287 on January 28, 1981. That Order provides in pertinent part:

> By the authority vested in me as President by the Constitution and statutes of the United States of America, including the Emergency Petroleum Allocation Act of 1973, as amended (15 U.S.C. 751 *et seq.*), and notwithstanding the delegations to the Secretary of Energy in Executive Order No. 11790, as amended by Executive Order No. 12038, and in order to provide for an immediate and orderly decontrol of crude oil and refined petroleum products, it is hereby ordered as follows:
>
> Section 1. All crude oil and refined petroleum products are exempted from the price and allocation controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended. The Secretary of Energy shall promptly take such action as is necessary to revoke the price and allocation regulations made unnecessary by this Order.
>
> * * * * *
>
> Section 3. The Secretary of Energy may, pursuant to Executive Order No. 11790, as amended by Executive Order No. 12038, adopt such regulations and take such actions as he deems necessary to implement this Order, including the promulgation of entitlements notices for periods prior to this Order and the establishment of a mechanism for entitlements adjustments for periods prior to this Order.
>
> Section 4. The Secretary of Energy is authorized to take such other actions as he deems necessary to ensure that the purposes of this Order are effectuated.
>
> Section 5. Because advance notice of and public procedure on the decontrol provided by this Order would be

likely to cause actions that could lead to economic distortions and dislocations, and would therefore be contrary to the public interest, this Order shall be effective immediately.

46 Fed. Reg. 9909-10 (January 30, 1981).

The announcement of phased decontrol and the knowledge that all price-controls on crude oil would be lifted by October 1, 1981, imparted refiners with a new and unique opportunity to cheat or "game" the regulatory system and to make "windfall" profits. With the coming of decontrol, all a refiner had to do in order to maximize its profits on price-controlled crude oil, would be to somehow withhold barrels of the low cost price-controlled crude from the market until after the date of decontrol.[6] Of course, a barrel of price-controlled crude oil after the date of decontrol would be worth the higher world market price. Thus, when decontrol was announced on April 5, 1979, the petroleum industry was at once provided with further incentive to cheat and "game" the regulatory scheme, and with the method to accomplish these ends. In addition, unwitting participation in such schemes was forthcoming from the political arena. Due to his campaign pledge, President Reagan's election in November 1980, brought with it the chance that complete decontrol would be adopted before its scheduled date of October 1, 1981, and that profits could be taken even sooner. This turned out to be a safe bet, since, as stated already, decontrol of the petroleum industry was in fact ordered by President Reagan on January 28, 1981. Testimony provided by Mobil suggests that this was also the day when millions of barrels of once price-controlled crude oil suddenly began to "reappear." A more detailed ex-

[6] This conclusion is confirmed by the Validation Study at p. IX. A Congressional Committee reported that a similar problem of disappearing stripper well oil could also be traced to the anticipation of decontrol. *See* H.R. Rep. (96-150-58) 96th Cong., 2nd Sess., Committee on Interstate Commerce, The Case of the Billion Dollar Stripper (October, 1980).

amination of this phenomenon and its affect on the entitlements program follows.

At a May 12, 1981 hearing held by this Court on plaintiff's motion for a preliminary injunction, testimony was taken on the problem of the disappearance of price-controlled oil, and its specific affect on the entitlements program. Testifying for plaintiff Mobil was Mr. Roy K. Murdock, General Manager of Crude Oil and Gas Liquid for Mobil's United States Marketing and Refining Division. Murdock based his conclusions about the disappearance of price-controlled crude oil, and its subsequent reappearance, on an analysis of data contained in the "Domestic Crude Oil First Purchasers Report" and the monthly entitlements notices. Appropriately entitled, the First Purchaser reports, *inter alia*, collects data at the first point of purchase of crude oil, which is usually at the refineries. It will be recalled that the monthly entitlements notices publish data on each of the calculations relevant to the operations of the entitlements program, such as all refinery receipts. *See supra* at pp. 7-8. Therefore, a comparison of the two data systems can be expected to yield statistically similar volumes of crude oil moving throughout the industry.[7] Nontheless, it shall be seen that in actuality, wide discrepancies between the two systems are commonplace, thus evidencing the disappearance phenomenon.

Murdock testified at the hearing that the DOSR — the ratio of price-controlled crude to total runs to stills — has gradually declined between 1979 and 1980, with a marked decline evident in November and December of 1980. Tr. at pp. 48-49; Plaintiff's Exhibits ##3 and 4 [plaintiff's exhibits will be delineated Exh. #____.] In the same two-year period the price of an entitlement — the difference between the cost of lower tiered price-controlled and uncontrolled crude oil — more than tripled from $8.74 to $27.06. *Id.* As for the comparison of the First Purchasers data and entitlements program receipts,

[7] The soundness of this conclusion is confirmed by the Validation Study, Appendix J at pp. J-28 - J-30.

Murdock testified that in the past two years a disparity or disappearance occured in volumes of lower tier price-controlled crude reported, and that this disparity has increased over time. Exh. ##5 and 6. In January, 1979, some 179,000 barrels of price-controlled crude oil were disappearing *every day*. By December, 1980, the rate of disappearance had increased to 520,000 barrels of price-controlled crude oil every day. Tr. at pp. 53-53.

A comparison on the First Purchasers and entitlements program data on upper tier crude oil shows equally dramatic trends. Tr. at pp. 56-59; Exh. ##7 and 8. For approximately the first six months of 1979, more upper tier crude was reported as received at refineries than was produced and sold during that period. This trend inverted by August 1979, and a disparity or disappearance of 23,000 barrels per day of price-controlled crude oil was reported. By December of 1980 the disappearance rate had increased to 426,000 barrels per day. It should be added that the relative price of upper tier crude oil during this period changed substantially. At the beginning of 1979 upper tier crude was very near in price to the world market price of crude oil. However, by the end of 1979 the world market price of crude oil had out-paced the price of upper tier crude, and was worth approximately twice as much. The data for upper tier Alaskan North Slope Crude, which has been price-controlled since May 1980, shows a pattern similar to that of upper tier crude. Tr. at pp. 60-62; Exh. ##9 and 10. At the same time, overall production in all tiers of price-controlled crudes was declining throughout 1979 and 1980. Tr. at p. 64. Nevertheless, a calculation of the percentage disparity, for example, in both categories of lower and upper tier crude is quite revealing. In January 1979, 2.3% of lower and upper tier crude oil had disappeared; by December 1979, 43.4% of lower and upper tier crude oil had disappeared. Tr. at pp. 64-66; Exh. ##12 and 13.

In total figures, in the year 1979, between 5.2 million and 10.4 million barrels of crude oil were disappearing from the regulatory system *every month*. By the year 1980, between 12.0

million and 29.6 million barrels of crude oil were disappearing *every month*. Tr. at pp. 69-71; Exh ##14 and 15.[8] While these millions of barrels of price-controlled crude oil were disappearing, curiously, it seems that at least some of this crude oil was reappearing as decontrolled crude. In January 1980 a surplus of 175,000 barrels per day of decontrolled crude oil appeared in the regulatory system. This figure represents crude oil that was reported as receipts by refiners, but was not reported as having been purchased by first purchasers. By December of 1980, there were 809,000 barrels per day of decontrolled crude oil reappearing in this manner, even though there was really no record of it having been produced. Tr. at pp. 81-83. Significantly, the accuracy of all the data described above is not contested by the DOE.

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[8] The Validation Study also reported on the disappearance of price-controlled crude oil:

> Comparisons of adjusted DCOE data to data reported on the Domestic Crude Fuel Purchaser (sic) system (DCFP) for the period 1977 through 1979 show DCFP data to be greater on an annual basis for all receipt categories combined with net annual differences decreasing from 158.2 million barrels in 1977 to 102.9 [hand corrected in Report to 33.9] million barrels in 1978 [hand corrected in Report to 1979]. In 1979, aggregate domestic receipts reported to DCOE exceeded those reported on DCFP by 1.2 million barrels. Since some of the total net differences in 1979 may be accounted for by condensate and utility and other non-refining usage, on a gross yearly basis, the vast bulk of domestic crude sold to first purchasers appears to find its way to refiners.
>
> Important differences have been found, however, in comparing categorical volumes reported on the two systems. Particularly in 1979, both old oil and new oil have "disappeared" between DCFP and DCOE systems. In the case of old oil, the 1979 difference resulted in a net "disappearance" of 78.4 million barrels (215,000 barrels/day) or 9.78 percent of all reported DCOE receipts. If this discrepancy was in fact due to errors in the DCOE system, then old oil for 1979 could be said to have been

If the cost of an entitlement is factored into these figures for disappearing crude, remembering that between 1979 and 1980 the price of an entitlement was increasing, $5.6 *billion* of entitlements obligations were not channeled through the entitlements program on a total volume of over 250.3 million barrels of price-controlled crude oil. Tr. at pp. 71-75; Exh ##15 and 16. Moreover, from the American public's point of view, if price-controlled crude that disappeared later reappeared as higher priced uncontrolled crude, then this $5.6 billion figure represents increased crude costs that may be passed on to them. The Court will next address in more specific terms the ways in which the disappearance of price-controlled crude impacts upon entitlements program refiners. Afterwards, the possible explanations for the disappearance will be considered.

> understated by 8.91 percent. For the 3 year period, old oil may have been up to 9.87 percent understated. [See Appendix K, #28].
>
> New oil receipts also differed between the two systems (DCOE and DFCP) in 1979, such that 9.4 million barrels (26,000 barrels/day) or 0.87 percent may have "disappeared." New oil receipts then may have been 0.86 percent understated in 1979.

Id. at pp. 65-66. *See also* Validation Study at pp. i, vii, 95, 96, J-28 - J-32. The Validation Study further confirmed that upon "disappearing," the price-controlled crude "reappeared" as uncontrolled crude. Summarizing the twin problems of the disappearance and reappearance of crude oil, the Validation Study concluded:

> The impacts or consequences of these discrepancies are, however, significant. In terms of data quality, the net volume of "missing" old oil represents 9.78 percent of the volume of old oil reported on DCOE in 1979 (7.5 percent of the reported volumes for all three years). The net volume of "missing" new oil represents 0.9 percent of the volume of new oil reported on DCOE in 1979 (for the three-year period, new oil receipts reported on DCOE exceeded those on DCFP by 0.6 percent of the reported new oil receipts on DCOE).

Id. at p. 96.

To understand how the disappearance of price-controlled crude oil affects the entitlements program refiners, the mechanics of the program must be reconsidered. The disappearance of price-controlled crude oil causes a concomitant reduction in the DOSR — the ratio of price-controlled crude to the national total runs to stills. Since the number of entitlements issued to each refiner is a product of the DOSR and that refiners' runs to stills, a shrinking DOSR will cause less entitlements to be issued to all refiners in the program. This means that an entitlements purchaser will have to purchase more entitlements to make up for this net loss, and to be able to refine its excess of price-controlled crude over the national average. By the same token, a seller of entitlements is negatively affected by being issued less entitlements, because it will have fewer entitlements to sell in order to offset its limited access (in comparison to the national average) to price-controlled crude. Moreover, the disappearance of price-controlled crude oil increases the likelihood that the DOSR will shrink to such a low level that it would cause many traditional entitlements sellers to have access to more price-controlled crude oil than the national average.[9] With this change in position these traditional entitlements sellers would themselves be required to become purchasers of entitlements.

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[9] Similarly, the Validation Study found that the disappearance of price-controlled crude oil had a major impact on participants in the entitlements program and on consumers. The Study observed that the problem of disappearing oil:

> Apart from considerations of data quality, from the standpoint of the entitlements program, "losses" of controlled crudes (old and new oils) cause the DOSR to be lower (i.e., understated). Thus, fewer entitlements are allocated and fewer entitlements obligations are paid. For example, using adjusted/amended total old and new oil receipt volumes for 1979, if the entire discrepancy between the DCOE and DCFP systems was in fact due to errors in DCOE data, then the amount of entitlements obligations not incurred can be estimated at $1.341 billion. For the reference month of December, 1979, if all of the apparent discre-

As a participant in the entitlements program Mobil has been directly affected by the problem of disappearing crude oil. Mobil traditionally has been a purchaser of entitlements and has expended some $800 million over the life of the program. Tr. at p. 38. In December of 1980, for instance, Mobil was required to purchase $48 million worth of entitlements. Because it has been a traditional purchaser of entitlements, Mobil has had to purchase additional entitlements as a result of the disappearance of price-controlled crude oil, and the fewer entitlements it has been issued due to the shrinking DOSR. *See* Exh. #3. Murdock testified that in 1979, with Mobil's approximately 5% industry share of the national runs to stills, Mobil paid an additional entitlements burden of $64.4 million on $1.3 billion of entitlements obligations that escaped the program as a result of the disappearance of price-controlled crude oil. In the year 1980, however, Mobil's increased entitlements burden was four times this amount. According to Murdock's testimony, $4.3 billion of entitlements obligations escaped the entitlements program in 1980, and Mobil's share of that burden was $220 million of additional entitlements purchases — all because of disappearing price-controlled crude. This figure represents 85% of Mobil's total entitlements obligation for that year. Tr. at p. 91; Exh. #21.

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pancy between the two systems (DCOE and DCFP) was caused by "errors" in the DCOE data, the DOSR would have been reduced from 0.234137 to 0.214510 (8.38 percent of what the DOSR "would have been" if the "missing" old and new oil was included). This would result in decreased entitlement allocations totaling $208.5 million (8.38 percent), increasing all refiners' per-barrel post-entitlement crude cost by $0.43 (1.85 percent). (See Appendix K, #40.)

From the customer's standpoint, if the crudes that disappeared in 1979 reappeared as higher-priced uncontrolled (such as stripper), then up to $1.344 billion in "extra" crude costs may have been passed through.

Validation Study at pp. 104-05. (Footnotes omitted).

Murdock testified that a variety of factors could have contributed or actually have caused the incredible disappearance of price-controlled crude. Certainly phased decontrol is one of these, since it was designed to gradually reduce the amount of crude oil subject to price-controls. A second factor is that the entitlements system is constantly undergoing adjustments and corrections. Yet the importance of either of these reasons is suspect due to the fact that the disappearance of price-controlled crude was both continuous, and increased at a faster rate than the base volumes of price-controlled crude were decreasing.[10] Tr. at p. 55; *see e.g.* Exh. ##5-8, 12.

Still a third possible explanation for the disappearance of price-controlled crude is the operation of the DOE's Tertiary Incentive Program. As part of the phased decontrol of crude oil, and for the purpose of increasing domestic production, the DOE adopted the Tertiary Program to provide producers with front-end financing for exotic or "enhanced" forms of oil recovery. *See* 46 Fed. Reg. 25315 (May 6, 1981). This incentive was in the form of enabling a producer to recertify lower and upper tier crude oil as tertiary incentive crude, and, as a consequence, to receive the market price instead of the otherwise applicable controlled price. More specifically, under this program a producer may certify sufficient quantities of crude oil as tertiary incentive crude to enable it to receive additional revenue to recover expenses on seventy-five percent of certain enhanced forms of crude oil recovery. Murdock raised the possibility that, in the process of recertifying the price-controlled crude oil as tertiary incentive crude, the First Purchasers or entitlements program data might not have ac-

[10] The Validation Study supports the view that factors such as the definitional differences between the First Purchasers and entitlements programs, adjustments and errors in reporting, only would account for an insignificant net disappearance of price-controlled crude. *Id.* at pp. 96-100. Furthermore, the Study eliminated the possibility that non-refinery uses of crude oil had a material affect on the statistics for disappearing price-controlled crude oil. *Id.* at p. 98.

curately accounted for and reported this recertification. Thus, a reporting error could have resulted such that a barrel of price-controlled crude would seem to have disappeared upon a comparison of the First Purchasers and entitlements program data.

After raising this possibility, Murdock effectively demonstrated that it was an implausible explanation for the disappearance of price-controlled crude. Murdock conceded that the Tertiary Program would cause the DOSR to shrink because tertiary incentive crude reduced the quantity of price-controlled crude on the market. As described before, a shrinking DOSR causes additional burdens to befall entitlements program refiners. *See supra* at pp. 14-15. But he discounted the likelihood that the failure of first purchasers to adjust for tertiary incentive crude could account for the significant disappearance of price-controlled crude oil. Some further background on the adjustment procedures in the First Purchasers Report and the entitlements program will prove useful.

There is a difference in adjustment procedures between the First Purchasers and entitlements program data collection systems. In the First Purchasers system, a barrel of crude oil reported as price-controlled in the month of September, for example, and subsequently recertified the following month as price-controlled crude, would not cause the September First Purchasers data to be adjusted. Instead, the recertification would be shown in the next month's First Purchasers report. The contrary is the case with the entitlements program, which would adjust its September data to reflect the recertification of the price-controlled crude. However, based on the foregoing, a subsequent comparison of the First Purchasers and entitlements program data for the month of September would show that one barrel of price-controlled crude had disappeared. Furthermore, it is possible that a disappearance could also be caused if the first purchaser were to simply fail to make the amendment in the First Purchasers Report to reflect the tertiary incentive recertification to begin with. In both of these examples the disappearance would have been caused by the fact

that the barrel of price-controlled crude was not entered into the September First Purchasers Report as price-controlled crude, but was adjusted in the September entitlements program data as tertiary incentive crude.

Murdock testified that for several reasons these two scenarios are improbable explanations for the disappearance of significant quantities of price-controlled crude oil. First, he stated that there was absolutely no incentive for a first purchaser of crude oil to "neglect" to properly amend its First Purchaser filing to account for the recertification of tertiary incentive crude. Tr. at p. 110. A refiner's First Purchaser filing is nothing more than a report, and does not, unlike the refiner reports of the entitlements program, affect that refiner's financial obligations under the DOE's regulatory scheme. *Id.* at 110-11. In fact the opposite appears to be the case. The First Purchasers Report for the year 1980, and for January of 1981, *see* Exh. #1, reveals that in fact first purchasers accounted for hundreds of thousands of barrels of tertiary incentive crude. Moreover, at the hearing on plaintiff's preliminary injunction motion, there was no evidence presented that would suggest that the accuracy of the First Purchasers Reports should be substantially doubted.[11] And while it would be possible that, in recertifying tertiary incentive crude, differences in deadline amendment requirements could cause a barrel of price-controlled crude to seem to have disappeared, adjustment procedures would eventually account for the disappearance in the following month's data, and no net loss actually would have occurred.

Of greater moment is the fact that, even assuming arguendo that the disappearance of price-controlled crude oil could be explained by misreporting in the Tertiary Incentive Program, this rationale would not account for most of the crude oil that has disappeared. The volume of crude oil attributable to the entire Tertiary Incentive Program is relatively insignificant

[11] *See supra*, note 10.

when compared to statistics on the total volume of disappearing price-controlled crude. Tr. at p. 126. Furthermore, the problem of misreporting in the Tertiary Incentive Program, under the scenario outlined above, would only address the disappearance of price-controlled crude oil that has *already* been booked as such into the entitlements program as a refinery receipt. By contrast, the disappearance of crude oil as reflected in a comparison of the First Purchasers and entitlements data, is caused by the problem of crude oil that has not been booked into the entitlements program in the first place. Therefore, the purported problem of misreporting in the Tertiary Incentive Program could not explain how millions of barrels of price-controlled crude oil, accounted for in the First Purchasers Reports, subsequently disappeared and were never booked into the entitlements program.[12]

Murdock testified that the most reasonable explanation for the disappearance of price-controlled crude, and why much of it never seems to reach the entitlements program, is due to the use of manipulative inventory practices by refiners in the entitlements program. Tr. at pp. 53-4. For a refiner looking to maximize profits through the sale of price-controlled crude after decontrol, entitlements obligations would first have to be avoided. Manipulative inventorying uniquely serves this end. After the announcement of decontrol, refiners realized that commonly used inventory practices in the industry could also be employed to delay the booking of their relatively inexpensive price-controlled crude as received at the refinery (this is called "selective inventorying," tr. at p. 78), until after the date of decontrol, when it would be worth the much higher

[12] The Validation Study concluded: "Thus while the inclusion (or exclusion) of out-of-period adjustments can be seen to affect any comparisons of *monthly totals*, over longer periods of time (e.g., 1 year), these monthly variations can be expected to cancel each other out, and the inclusion (or exclusion) of adjustments or amendments can be seen to contribute to very little, if any, to the apparent discrepancies between systems." *Id.* at p. 98.

world market price. The obvious point of this exercise was to avoid the entitlements obligations in order to make a "windfall" profit from the difference between the controlled and market price — approximately $25.00 per barrel — on each barrel of price-controlled crude inventoried in this manner. Tr. at p. 38. In other words, the purpose of the plan was to make price-controlled crude oil disappear, and then later reappear for sale after decontrol.

If refiners scanned the horizon to search out obstacles to this plan in general, or to manipulative inventory practices in particular, they were not to find them in the DOE's entitlement program regulations. Actually, even before the announcement of decontrol, a variety of manipulative inventorying practices were already permitted by the entitlements program's regulations and reporting procedures. The origins of such practices may be traced to the program's accounting constructs, which provide that an entitlement obligation is to only be imposed at the time a barrel of price-controlled crude oil is reported as having been received by the refinery. More specifically, a refinery receipt is charitably defined as follows:

> "Crude receipts" means, as to a particular refiner, the volume of crude oil (a) booked into its refineries in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, for its own account or for the account of a firm other than a refiner or (b) if not previously so booked into its refineries, delivered by that refiner for its account to another refiner pursuant to a processing agreement with that other refiner. Crude oil receipts shall not include crude oil received by a refiner for the purpose of processing at its refineries for the account of another refiner. A particular crude oil receipt shall be deemed to have occurred when the related cost is booked into refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, whether or not such crude oil has been actually received by that refiner, except that

> crude oil delivered by one refiner to another refiner pursuant to a processing agreement will be deemed to have been delivered by the delivering refiner to the other refiner when the risk of loss passes to the other refiner under the particular processing agreement or when the crude oil is received at the refinery of the other refiner, whichever occurs first. Crude oil which has been added by a refiner to its inventory and which is thereafter sold or otherwise disposed of without processing for the account of that refiner shall be deducted from its crude oil receipts at the time when the related cost is deducted from refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned. The volume of domestic crude oil included in a refiner's crude oil receipts shall be evidenced by and consistent with invoices received with respect to such crude oil receipts.

10 C.F.R. § 211.67 (1980); *See* tr. at pp. 84-5.

Thus, constrained simply by the flexible requirement that they employ "accounting procedures generally accepted and consistently and historically applied," a refiner is in effect allowed by the regulations to report a receipt of price-controlled crude for entitlements purposes at any point in the supply chain from wellhead to refinery gate.[13] Tr. at p. 102. A

[13] Murdock's testimony on the flexibility of entitlements program regulations was confirmed by the Validation Study:

> The program-dependent nature of the key data elements thus tends to cloud what appear to be otherwise straight-forward definitions. Particularly in the case of receipts, substantial interpretational latitude for respondents is built into the system by the regulations. Total receipts for the industry include volumes of crude at every stage of the supply chain from wellhead to refinery gate. While most receipts are directly tied to some physical transaction that has already occurred (e.g., receipt at the refinery gate, transfer of title at the point of first sale, or loading into a tanker), in some cases receipt volumes are tied to

variety of accounting techniques have been used as a result, as have inventory practices designed to take advantage of them. For instance, some refiners use the "refinery gate" method which reports the crude as a receipt at the time it physically enters the refinery.[14] This legally enables a refiner to leave unreported for entitlements purposes, any price-controlled crude that has been purchased by the refiner, but continues to be physically located outside the refinery; such as in pipelines, intermediate storage, and in terminals or ships.[15] Tr. at pp. 53-4. This practice is to be distinguished from the method whereby a barrel of crude is deemed as a receipt when some physical transaction has already occurred. For instance, Mobil uses a point of purchase (usually at the wellhead) inventory practice. By comparison to the previous example, Mobil would be required to report for entitlements purposes, crude it had purchased though had not as yet physically received. Tr. at p. 86.

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physical transactions that will (or are expected to) occur in the future (i.e., in the case of some exchanges). In addition, many individual respondents report crudes from different sources in different ways, thus qualifying the meaning of receipts for that respondent alone. In short, the data elements are *financial/accounting* and *program constructs* that have little meaning outside their programmatic contexts.

Id. at p. 42. *See also* Validation Study at pp. 8, 40, 93; Appendix I at p. I-6; Appendix J at p. J-28.

[14] The Validation Study reported that "about 30 percent of the refineries sampled booked domestic receipts upon receipt at the refinery gate." *Id.* at p. 68.

[15] In this regard the Validation Study states that "Respondent interviews confirmed that many large integrated companies do not necessarily book crude immediately into 'refinery accounts.' Instead, crude may be carried on the books of a production or supply company, and reported as being physically located not at refineries." *Id.* at Appendix J, at p. J-36.

Another legal and quite commonly used practice is called "time exchanges." *See* 10 C.F.R. § 211.67(g) (1980). Under this practice a refiner, for example, exchanges crude with another refiner in one month, with the intent that crude oil of similar quality and quantity would be returned in the following month. However, under the entitlements program's regulations, the receipt of the crude oil need not be reported until it is actually received on exchange.[16] Tr. at p. 78. It will be recalled that an entitlement obligation is only incurred when a barrel of price-controlled crude is booked into a refiner as a receipt. With the use of time exchanges, a refiner could exchange away price-controlled crude for decontrolled crude to be returned on the event of decontrol. The regulations, moreover, would seem sufficiently broad to permit refiners to engage in reciprocal time exchanges so that both could assist the other in avoiding the entitlements obligations. Tr. at p. 79. At the same time, Section 211.67(g) apparently would permit a refiner to avoid reporting receipts of price-controlled crude oil exchanges, where the terms of the exchange were not limited to location and quality differentials, and instead focused on the crude oil "tier" being exchanged. A refiner engaged in this type of practice with a reseller or other refiner that had been able to avoid reporting a crude oil receipt under the entitlements program, would not have to report a price-controlled exchange after decontrol.

The final manipulative inventory device that will be discussed is called "splitting entitlements." Tr. at p. 85. Murdock testified that the entitlements program regulations are flexible enough to permit refiners to selectively deem their non-refining inventories to be made up entirely of price-controlled crude oil. Refiners could take advantage of this regulation to avoid entitlements obligations. He described this practice as follows:

> In point of fact, a refiner is permitted, if his accounting system, historic accounting system allowed, to selectively

[16] *See supra*, note 13.

deem that price-controlled oil as being short-stopped or withheld in intermediate inventory as illustrated on this chart and that uncontrolled oil is being withdrawn from that inventory outside the refinery and delivered to the refinery.

* * * * *

Price-controlled oil would appear to, would seem to disappear between the first purchaser and the refinery while uncontrolled oil would reappear. The obvious intention of this action would be to retain that price-controlled oil in that tank outside the refinery prior to its positon, prior to its imposition of entitlement obligation until decontrol.

Tr. at pp. 85-6; *see* Exh. #21.[17]

Still, to fully understand the likely impact of these inventory practices on the problem of disappearing crude oil, it must be appreciated that even before the announcement of decontrol, refiners manipulated their stocks of crude oil to reduce inventory costs and to maximize their profits.[18] This too was accomplished by intentionally inventorying the less expensive price-

[17] This practice was uncovered by the Validation Study:

If it is assumed that holders of crude stocks will seek to minimize their inventory costs, then it will be advantageous for them to attempt, wherever possible, to have those inventories consist of lower-priced crude (i.e., old oil). This hypothesis was shown to be true in the case of one major integrated oil company that held crude stocks outside its refinery accounts and thus outside the entitlements program. These stocks intentionally consisted of predominately old oil. In that company's case, the separate crude supply division acted essentially as a reseller of crude, "selling" only such crude to the refining entity as it chose to (in this case, higher-priced, generally uncontrolled crudes) in order to keep its inventory value as low as possible.

Id. at p. 103; Executive Summary at p. IX.

[18] The Validation Study confirms these practices were employed between the years 1977 and 1979:

controlled crude, and by constantly refining the more expensive uncontrolled crude. Moreover, even then the price-controlled crude was "short-stopped" outside the refinery to avoid the entitlements obligations.[19] It therefore seems highly probable that since the announcement of decontrol, each of the above described inventory practices have continued to be used by refiners, but with the promise of much more profitable results, than before. Plainly, these practices would perfectly serve both to enable a refiner to avoid entitlements obligations, and to resell price-controlled crude after decontrol in order to take advantage of the world market price. And consider the incentive to misreport: the fewer barrels of price-controlled crude an entitlements seller reports, correspondingly fewer entitlements will be charged off of its total obligations. Similarly, the fewer barrels of price-controlled crude reported by an entitlements purchaser, correspondingly fewer entitlements will have to be purchased.

Furthermore, the manipulative inventory practices just described could not only accomplish these ends, they were virtually sanctioned by the DOE's flexible regulations. Thus, it is reasonable to assume that manipulative inventorying would explain much of the disappearance of price-controlled crude, especially when it is considered that other devices that could

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Exhibit J-23 also shows that while "entitlement stocks" have been drawn down over the three-year period (28.8 million barrels), stocks held at locations other than refineries have been significantly built up (124.3 million barrels). This finding is relevant to the problem of the "disappearance of old oil" in that one explanation given the problem was that stocks may have been built up, possibly with significant volumes of controlled crude, outside refinery accounts for entitlements purposes.

Id. at p. J-38.

[19] *Id.* at pp. 101-02.

be employed to achieve the same results were illegal.[20] For instance, the miscertification of price-controlled crude oil as decontrolled crude carries with it the possibility of incurring civil and criminal liabilities.[21] *See* 10 C.F.R. § 205.203 (1980). As Murdock aptly stated in his testimony before the Court:

> I think it's very unreasonable to assume that the magnitude of the disappearance that I have shown on these charts is a result of criminal action. Miscertification is a criminal act and while I don't doubt that there are criminals in the oil business, as well as any other business, it is inconceivable that disappearance of this magnitude could be the result of criminal acts and it would be inconceivable to imagine that oil companies would engage in criminal acts when exactly the same financial benefit could be obtained by a perfectly legal, or at least certainly not prohibited, application of the Department of Energy regulations. For that reason we are very convinced that the great bulk of the disappearance which has occurred in the last two years is, in fact, the result of this inventory manipulation.

Tr. at p. 87. Murdock added that miscertification more likely played a role in the disappearance of price-controlled crude before 1979; in other words, before the announcement of the coming of decontrol was made. At that time the average rates

[20] The Validation Study uncovered no evidence of miscertification. *Id.* at p. 100. Moreover, it compared the practice of miscertification to that of manipulative inventorying, and of the latter concluded: "This practice is essentially different from the incentives to misreport discribed [sic] in this Appendix. To a large extent the practice entails taking full advantage of the regulations." Appendix L at p. L-2.

[21] This may explain why between 1974-1977, the DOE has issued only $83.5 million in "Notices of *Probable* Violations" (emphasis supplied), on a total entitlements obligation of $39 billion for the same period. Validation Study at p. 61.

of disappearance were smaller, fluctuating between 2.5% and 4.0%. Tr. at pp. 86-7.[22] This is probably because before the announcement of decontrol refiners had limited options available to them to "game" the entitlements program. As a result, they would be more likely to turn to more desperate means, such as miscertification, to profit from selling price-controlled crude oil as uncontrolled crude. Of course, after the announcement of the coming of decontrol, they could in addition "game" the entitlements program to make even greater margins of profit.

A final factor that increases the likelihood that manipulative inventory practices were the primary cause of the large quantities of price-controlled crude after 1979, is the substantial "reappearance" of similarly large quantities of uncontrolled crude.[23] As indicated already, a comparison of the First Purchasers Reports and the entitlements program data reveals that uncontrolled crude was reappearing after the announcement of decontrol in greater amounts than had been reported

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[22] The Validation Study found insignificant amounts of miscertifications during that period:

> Audits by DOE (Enforcement and the Office of Special Counsel) of entitlements records have similarly found a relatively small volume of violations. It was estimated that less than 0.5 percent of total reported volumes and/or entitlements benefits — see Chapter III, Part E.2.b. Enforcement audits as of February, 1978 determined that for the period November, 1974 to December, 1976, old oil receipts were understated by less than 720,000 (approximately 5,600 barrels per day), while new oil receipts were overstated by about 240,000 barrels (approximately 19,000 barrels per day). On the other hand, preliminary audits of five resellers conducted by ERA in 1977, indicated that approximately 50,000 barrels per day of old oil were being certified as new oil.

Id. at pp. 100-101 (footnotes omitted).

[23] *See supra*, note 18; *see also* Validation Study at pp. 94-95; Exh. ##18 and 19.

even as being produced in the same time period. This finding is consistent with the use of "selective inventorying," "time exchanges," and "splitting entitlements." Each of these practices would enable a refiner to hold price-controlled crude outside of the refinery, and thereby avoid the entitlements obligation, while permitting the refiner to process more expensive uncontrolled crude. In sum, motivated by the opportunity to make "windfall" profits after decontrol, manipulative inventorying practices provided refiners with perfectly legal means to make such profits. A comparison of the First Purchaser's Reports and entitlements program data would seem to verify that refiners took advantage of this opportunity. Tr. at pp. 77-80.

While understandably reluctant to admit it, for at least four years now the DOE has been keenly aware of the problem of disappearing price-controlled crude oil, and the fact that literally millions of barrels of price-controlled crude have not been accounted for in the entitlements program. On April 15, 1977, some two years before the announcement of decontrol, a Mobil vice-president, Bonner H. Templeton, wrote to J. F. O'Leary, administrator of the FEA, to complain about the problem of the disappearance of price-controlled crude. Templeton stated in his letter that for the twelve months commencing February 1976, a comparison of the First Purchasers Reports and entitlements program data revealed a 1.0% disparity in the quantities of "old oil" reported. In addition, Templeton stated:

> Assuming such conversion is solely to upper tier crude, this difference of 1% represents an overall increase in industry crude costs to refiners of about $0.5 million per day, or $190 million per year. Again, assuming that there is no mathematical or other explanation for this difference the mechanics of the Entitlements Program are such that the industry's crude costs are being increased. The end result is an apparent windfall to a few individual firms at the expense of others.

He concluded his letter by requesting that the DOE conduct a thorough investigation of the problem.

In response to Templeton's letter, Gorman C. Smith, Acting Deputy Administrator of the FEA, wrote back in a letter dated May 19, 1977, that the problem of the variances in data between the two systems was a concern to the FEA, and that "a thorough analysis and review of the data is being conducted." By June of 1977, this investigation had been completed, and a report entitled "Survey of the Disappearance of Old Oil" (1977 Survey) was submitted to Administrator O'Leary from Wayne W. Porter of the FEA's Office of Compliance Operations and Regulatory Programs. To assess the problem of disappearing price-controlled crude, the 1977 Survey compared the First Purchasers Reports with the entitlements program data for two periods: from February through December 1976, and from January through April 1977. The 1977 Survey made the following findings:

> A comparison of this data for the period February through December 1976 showed that first purchasers reported 89,000 barrels per day (B/D) more of the lower tier crude (old oil) than was reported by the refiners. In the same period 85,000 B/D more upper tier crude was reported by the refiners than was reported by first purchasers.
>
> The disappearing oil problem has grown recently. Between January and April 1977 refiners reported 201,000 B/D less old oil than the first purchasers. Upper tier crude receipts reported by the refiners exceeded that reported by first purchasers by 82,000 B/D. An additional 119,000 B/D of old oil reported by first purchasers were not reported in refiner receipts.

Id. at p. 1.

The 1977 Survey went on to state that the problem of disparities between the two data systems had "remained at essentially the same level throughout the period of com-

parison." *Id.* However, it concluded that there was "no clear explanation for this sudden growth in 'disappearing' old oil." *Id.* The 1977 Survey, nevertheless, did isolate "potential causes" of the problem as being "erroneous reporting" and "regulatory loopholes." *Id.* at p. 2. Specifically, the 1977 Survey found that miscertifications of tier categories "account for a significant portion of the old oil which has become upper tier." *Id.* Also uncovered were "inconsistencies and definitional problems in reporting crude receipts involving [time] exchanges." *Id.* Still another cause of the disappearance of price-controlled crude was traced to the fact that there was no requirement in the entitlements program that crude oil used for non-refining purposes be reported. The 1977 Survey stated: "Consequently, the volumes of old oil used by refiners for fuel, as well as the old oil sold by resellers to firms which do not refine the oil, disappear from the reporting system." *Id.* at p. 4. This practice, is, of course, consistent with "splitting entitlements." *See supra,* at p. 22.

A year later, the same data collected in the 1977 Survey, was again analyzed by a separate DOE sub-agency in a report entitled "Background Paper on the Disappearance of Old Oil," dated March 14, 1978; internal memorandum for Lincoln E. Moses by Charles E. Smith. (1978 Paper). This additional study confirmed each of the conclusions made in the 1977 Survey. First, that in conjunction with the disappearance of "old oil," "new oil" was reappearing in the entitlements program. *Id.* at p. 6.[24] And second, that the rate of disappearance had increased during the February through January 1977

[24] According to the 1978 Paper:

> A comparison of these data for the period February 1976 through January 1977 showed that the first purchasers reported 108,000 barrels per day more of old oil than was reported by the refiners. For this same period of time, the first purchasers reported 91,000 barrels per day less of new oil than was reported by the refiners.

Id. at p. 6.

period, such that "old oil" was not only reappearing, but it was disappearing from the entitlements system altogether. *Id.* at p. 7.[25] Third, the 1978 Paper attributed these statistics primarily to miscertifications of crude oil tiers, and secondarily to misreporting due to time exchanges and crude oil used for nonrefining purposes. *Id.* at pp. 10-12.

As already described in this Memorandum-Decision, the DOE also undertook to commission an independent study of the problems in the entitlements program's data systems. This study has been completed and is entitled "Validation of the Crude Oil Entitlements Information System," dated March 9, 1981. (Validation Study). In assessing the performance of the entitlements program's data system, the Validation Study compared the First Purchaser Reports with entitlements program data for the years 1977 through 1979. The Validation Study observed: "We found, as other previous investigations have, [citing the two previously mentioned studies among others] that the volumes of domestic crude reported as old oil on [First Purchasers Reports] are larger than those reported on the [entitlements program data] system. . . . The missing old oil is approximately 241 million barrels, or an average of 220,000 barrels per day over the 1977-1979 period." *Id.* at pp. vi-viii. The Validation Study concluded as follows:

> To the extent that nonrefining inventories consist of crude oil reported to the First Purchaser System as old oil but not to the DCOE, then these volumes would seem to have "disappeared." If it is assumed that firms will seek to minimize their inventory costs and maximize the value of an entitlement, then it would be to their advantage to

[25] [the date] indicates that, although the amount of old oil which turned into new oil has remained relatively stable (approximately 1.20% of total crude oil), the amount of crude oil which has "disappeared" from the system altogether has increased markedly (from -.22% to 1.71%).

1978 Paper, at p. 8.

> have these inventories consist mainly of the cheaper price controlled crude oil. With the advent of decontrol, those companies that have considerable inventories of old oil will be able to sell the oil at uncontrolled prices, which are four or five times greater than the purchase price of old oil. Companies that did not follow such a practice will more than likely be at a competitive disadvantage, but we are unable to qualify this problem.

Id. at pp. ix-x.[26]

On December 16, 1980 Allen E. Murray, President of the Marketing and Refining Division of Mobil wrote to the Secre-

[26] *See also* Affidavit submitted by Barton R. House, Acting Administrator of the ERA, in *Metzenbaum* v. *Edwards,* Civil Action No. 81-405 (D.D.C. filed February 19, 1981). In a related context, Mr. House gave testimony in support of the President's decision to order decontrol without notice and comment. In this regard, Mr. House stated:

> If the effective date of the decontrol order had been deferred pending notice and comment, producers, resellers and refiners of price-controlled crude oil could have been expected to engage in various forms of stockpiling and hoarding in order to capture the benefits of selling the crude oil at uncontrolled prices once the decontrol order became effective. The benefits to producers, resellers and refiners of such delay during the rulemaking period could have been substantial. As of December 1980, lower tier crude oil was selling to refiners for an average of $7.49 per barrel and upper tier crude oil was selling for an average of $15.51 per barrel. The market price of crude oil at that time was $34.55. Therefore, the expected additional profit to be gained by withholding old oil would be $27.06 per barrel and $19.04 per barrel for upper tier crude oil. Companies could have withheld price controlled crude oil from the market, for example, by reducing present production levels, modifying their standard inventory procedures, using all available storage tank capacity, and hiring and filling oil tankers to capacity for use as storage.

Affidavit of Barton R. House, ¶ 4 (February 24, 1981); annexed to plaintiff's complaint as Exhibit C.

tary of Energy about the increasing rate at which price-controlled crude was disappearing "in the last few months." Murray stated in his letter that "[t]he total controlled oil disappearance as reported through September by DOE now amounts to over half a million barrels per day or 6 percent of total U.S. production. These losses of controlled crude are largely offset by increases in the volume of refiner stripper oil receipts." Deputy Secretary Lynn R. Coleman responded in a January 19, 1981 letter to Murray, in which he stated that "I have asked the Office of Special Counsel for Compliance to look into this matter. As the Office responsible for monitoring the compliance of the 35 largest refiners with the Department's pricing and allocation regulations, the Special Counsel's office is particularly interested in this problem."

Mobil claims that despite its repeated attempts to bring the problem of disappearing crude oil to the DOE's attention over the course of four years, those efforts proved futile. Undeterred, nevertheless, Mobil then petitioned the Economic Regulatory Administration of the DOE to institute an emergency rulemaking proceeding to take comments on a proposed regulation that would impose an entitlements obligation on every barrel of price-controlled crude oil received though not reported by refiners and resellers between November 1, 1974 and January 28, 1981. In its petition, Mobil described the proposed amendments as follows:

> The purpose of these amendments is to ensure that, with the abrupt termination of federal price controls on the production and sale of domestic crude oil, the benefits, as well as the burdens, of such regulations have been borne equitably by all affected parties including consumers. Abrupt termination without full accountability by each refiner and reseller for price-controlled crude oil held in inventory on the date of decontrol will result in an unwarranted windfall to some firms at the expense of other companies and consumers.

February 10, 1981 Petition for Emergency Rulemaking Regarding the Domestic Crude Allocation Program, at p. 1;

Defendants' Exhibit A. The DOE informs the Court that Mobil's Proposed Rulemaking remains under consideration. On March 12, 1981 Mobil also filed an appeal of the DOE's December, 1980 entitlements notice with the DOE's Office of Hearings and Appeals (OHA), and a decision on this appeal is still pending. Mobil has, in addition, filed a request to stay the January entitlements notice pending a decision on its appeal, but the OHA has not responded to this request within its regulatory mandated time period of ten working days. *See* 10 C.F.R. § 205.199(h)(i)(1980).

Accordingly, Mobil filed this action on April 10, 1981 and seeks a declaration from this Court that the DOE's post-decontrol entitlements notices are unlawful. Mobil additionally prays for injunctive relief to prevent the DOE from issuing any further entitlements notices, until such notices fully take into account all price-controlled crude oil produced and sold between November 1, 1974 and January 28, 1981. Mobil contends that due to the manipulative practices of certain entitlements program refiners, entitlements notices as presently contemplated by the DOE are woefully inaccurate. The DOE's refusal to take corrective measures, says Mobil, is arbitrary, capricious, an abuse of the DOE's discretion, and in excess of its statutory authority under the Emergency Petroleum Allocation Act, *as amended*, 15 U.S.C. § 751, *et seq.* Lastly, Mobil argues that unless it is granted a preliminary injunction to protect the status quo, it will suffer immediate irreparable harm because it would never be able to recoup its lost revenues. Before the Court may address the merits of plaintiff's claims, defendant's motion to dismiss must first be considered.

IV.

The DOE has moved to dismiss plaintiff's complaint, and has put forward three separate, but related grounds. The first of these is that Mobil has failed to exhaust its administrative remedies. The DOE argues that Mobil has already raised the instant claims before the DOE in the form of a petition for

emergency rulemaking, and an appeal before the OHA. Since both the petition and the appeal remain under consideration by the DOE's relevant sub-agencies, and either could afford plaintiff all of the relief which it seeks in its complaint, the DOE contends that judicial review of these issues at this time would be premature and a waste of judicial resources. According to the DOE, the provinces of this Court are ill-suited to conduct an investigation and audit of the entitlements program, or to assess the implications of the various manipulative practices alleged by plaintiff. The DOE maintains that "This is obviously an area in which the initial factfinding and application of the regulations must be left to the agency prior to any involvement by the courts." Defendant's Memorandum in Support of Motion to Dismiss at p. 6. And finally, the DOE says that in addition to the administrative procedures outlined above, plaintiff has not undertaken to apply for "exception relief" to "prevent special hardship, inequity, or unfair distribution of burdens." 10 C.F.R. § 205.50 *et seq.* (1980). The DOE maintains that this form of relief is especially appropriate here since plaintiff claims that the impact of the regulatory scheme will have severe economic consequences on its operation.

Traditionally it has been held by the courts that a party will not be permitted to pursue judicial relief until available administrative remedies have been exhausted. *See e.g. Parisi* v. *Davidson,* 405 U.S. 34, 37-8 (1972); *McKart* v. *United States,* 395 U.S. 187, 193 (1969). *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938); *see generally,* 5 Mezines, Stein & Gruff, *Administrative Law,* § 49.01 (1979). The underlying purposes of the doctrine of exhaustion are multifold and have been summarized in *Mckart* v. *United States, supra* at 193-95, as follows: (1) to avoid premature interruption of the administrative process; (2) to permit the agency to develop the necessary factual background upon which decisions must be based; (3) to enable the agency to exercise its discretion or administrative expertise; (4) to improve the efficiency of the administrative process; (5) to conserve increasingly scarce ju-

dicial resources; (6) to provide an agency with the opportunity to discover and correct its own orders; and (7) to avoid the possibility that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *See also Hawthorne Oil & Gas Corp.* v. *DOE*, No. 5-50 (TECA, April 24, 1981), slip op. at 14-15; *Touche Ross & Co.* v. *S.E.C.*, 609 F.2d 570, 575-77 (2d Cir. 1979); *Diapulse Corp.* v. *Food & D. Admin.*, 500 F.2d 75, 77 (2d Cir. 1974).

However, in the absence of these factors, or in exceptional circumstances, a plaintiff will not be pressed to fulfill the exhaustion requirement. Thus, when the prescribed administrative remedy is plainly inadequate, for instance, due to unreasonable administrative delay, exhaustion is unnecessary. *Walker* v. *Southern Railway*, 385 U.S. 196, 198 (1966); *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 210 (1945). A plaintiff, moreover, will not be required by a court to exhaust administrative remedies when irreparable harm would result. *See Hawthorne Oil & Gas Corp.* v. *DOE*, *supra* at p. 14; *Touche Ross & Co.* v. *S.E.C.*, 609 F.2d 570, 576 n.11 (2d Cir. 1979). Neither will the doctrine of exhaustion be held to apply in the situation where the agency has clearly acted in excess of its statutory authority. *Leedom* v. *Kyne*, 358 U.S. 184, 188-91 (1958); *Hawthorne Oil & Gas Corp.* v. *DOE*, *supra* at p. 15; *Touche Ross & Co.* v. *S.E.C.*, *supra* at 575-76. And lastly, exhaustion will not be required where to do so would be futile, such as where the very administrative procedure under attack is the one that the agency says must be exhausted. *Hawthorne Oil & Gas* v. *DOE*, *supra* at p. 15; *Nat. Conservative Political* v. *Fed. Election*, 526 F.2d 953, 957 (D.C. Cir. 1980) (per curiam); *National Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692 (D.C. Cir. 1975); *Touche Ross & Co.* v. *S.E.C.*, *supra* at 577; *Finnerty* v. *Cowen*, 508 F.2d 972, 982-83 (2d Cir. 1974); *Davis* v. *Bolger*, 496 F. Supp. 559, 567 (D.D.C. 1980). In weighing these factors and balancing the relative interests involved, the applications of the exhaustion doctrine are within the sound discretion of the court. *NLRB* v. *Marine Workers*, 391 U.S. 418, 426 n.8 (1968).

With regard to the instant case, the Court does not believe it is necessary for plaintiff Mobil to further exhaust its administrative remedies. At this juncture some additional clarification of the issues in this case is appropriate. The central issues in this dispute may be summarized as follows: (1) Have substantial quantities of price-controlled crude oil disappeared from the entitlements program since its inception through the date of decontrol, such that the DOE's entitlements notices have not reasonably accounted for all price-controlled crude produced and sold during the life of the entitlements program. (2) If substantial quantities of price-controlled crude have disappeared and affected the reasonable accuracy of these notices, would the DOE exceed its statutory authority by issuing post-decontrol entitlements notices which it knows do not reasonably account for the price-controlled crude that has disappeared. (3) Will plaintiff suffer irreparable harm as a result of the issuance of post-decontrol entitlements notices which do not reasonably account for the price-controlled crude oil that has disappeared, and which, therefore, are not reasonably accurate.

As for the first of these issues, evidence submitted at the May 12, 1981 hearing on plaintiff's motion for a preliminary injunction conclusively demonstrates that in the years 1979 and 1980, approximately 250 million barrels of price-controlled crude disappeared from the entitlements program. The evidence also revealed that, as a result, some $5.6 *billion* worth of entitlements obligations were not channeled through the entitlements program. The DOE did not present any evidence at the preliminary injunction hearing to dispute these statistics. In fact, the DOE has totally conceded these points in its written submissions to the Court. *See* Defendants' Memorandum in Support of the Motion to Dismiss, at p. 7. Furthermore, the DOE does not dispute that the disappearance of price-controlled crude has caused substantial and unnecessary burdens to befall entitlements program refiners. Nor even does it contest that the issuance of post-decontrol entitlements notices in the form contemplated will exacerbate that burden.

But instead of conceding as well that the above admissions would tend to raise questions about whether the DOE has exceeded its statutory authority by issuing these inaccurate post-decontrol notices, the DOE has taken a different tack in this litigation. It seems to be saying that because it has not ascertained the exact causes for the disappearance of price-controlled crude, or decided what to do about the problem, plaintiff has failed to exhaust its administrative remedies. In the Court's view, not only do these contentions obfuscate the issues as stated above, they also misstate the record. For the moment the relevant inquiry does not concern the possible reasons for the disappearance of the price-controlled crude, or what actions the DOE should have taken or could take to eradicate the problem. Rather, the question in chief, and restated necessarily in view of the DOE's concessions, is whether the DOE has now exceeded its statutory authority by issuing the post-decontrol entitlements notices, while knowing full-well that such notices are not reasonably accurate, and would lead to further increase the already substantial and necessary burden of entitlements refiners.

As a consequence, despite the fact that the DOE continues to investigate the causes for the disappearance of price-controlled crude, though perhaps admirable, this would have no bearing on the exhaustion issue before the Court. What is essential is that the DOE is about to issue post-decontrol entitlements notices, and in so acting has arguably exceeded its statutory authority. Plaintiff claims that it will be irreparably harmed as a result. To be considered for exhaustion purposes, therefore, is whether plaintiff may now seek a judicial remedy. The Court believes that when the issue in this case is framed properly in this fashion, the above query must be answered in the affirmative. The Supreme Court dealt with a related situation in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). In that case the National Labor Relations Board had purportedly acted in excess of its authority when it certified a collective bargaining unit without permitting all interested employees to vote on the question. The Court found the exhaustion doctrine inap-

plicable and stated: "This suit is not one to 'review,' in the sense of that term in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific provision of the Act." *Leedom* v. *Kyne*, 358 U.S. 184, 186 (1958); *see also McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 17 (1962). The instant case falls within this well-settled exception to the exhaustion requirement. Specifically, whether the DOE acted "plainly beyond its jurisdiction" in deciding to issue post-decontrol entitlements notices which it knew were not reasonably accurate. *See Touche Ross & Co.* v. *S.E.C.*, 609 F.2d 570, 575 (2d Cir. 1979); *Sterling Drug, Inc.* v. *Weinberger*, 509 F.2d 1236, 1239 (2d Cir. 1975).

Flowing from these conclusions is that none of the purposes of the exhaustion requirement would be served by deferring to the DOE. The instant case does not present a situation where, by permitting judicial review, the administrative process would be prematurely interrupted. Based on the foregoing, it is clear that plaintiff complains herein of an administrative decision that has been completed. This Court may enjoin the effect of that decision, but in so doing, it would not be enjoining the administrative decision-making process. *See Touche Ross & Co.* v. *S.E.C.*, 609 F.2d at 576. It would also appear that there would be little use for additional development of a factual record since the issue here is the reasonableness of the DOE's conduct as based on existing facts. Moreover, a further sounding of the DOE's expertise in this matter would not be productive. The issues raised in this case are primarily legal. For example, one of the DOE's arguments is that it has no discretion in issuing the post-decontrol entitlements notices because it is required to do so by applicable regulations. This is a purely legal judgment on the part of the DOE, and it may properly be reviewed by the Court. *See Touche Ross & Co.* v. *S.E.C.*, 609 F.2d 570, 577 (2d Cir. 1979); *Consumers Union* v. *Cost of Living Council*, 491 F.2d 1396, 1399 (TECA) *cert. denied* 416 U.S. 984 (1974). Various other legal judgments also have been made by the DOE in reaching its deci-

sion on whether to issue the inaccurate entitlements notices. These include: the legal effect of President Reagan's oil industry decontrol order, *see* Executive Order No. 11287, 48 Fed. Reg. 9909 (January 28, 1981) and see *supra* at p. 10, has had on the DOE's supposed legal obligation to issue post-decontrol entitlements notices; the applicability of the underlying purposes of the Emergency Petroleum Allocation Act, 15 U.S.C. § 753(b)(1); and whether entitlement program refiners would suffer irreparable harm if the DOE released entitlements notices which were not reasonably accurate.

In addition, it seems clear that remanding this case to the DOE would be futile. The DOE claims that it is legally required to issue the entitlements notices, and therefore would not provide plaintiff with a remedy. And in a situation such as the present case, where the very administrative procedure under attack — here the DOE's investigatory process — is the one which the agency claims must be exhausted, it has been held that the exhaustion doctrine need not be applied. *See Hawthorne Oil & Gas Corp.* v. *DOE*, *supra* at p. 15; *Touche Ross & Co.* v. *SEC*, 609 F.2d at 577; *National Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 703 (D.C. Cir. 1975); *Diapulse Corp.* v. *Food & Drug Admin.*, 500 F.2d 75, 78 (2d Cir. 1974). Finally, plaintiff claims that it will be irreparably harmed should the DOE be permitted to issue the contemplated post-decontrol entitlements notices. As will be addressed in greater detail *infra* at pp. 75a-81a, Mobil claims that in the years 1979 and 1980, it was forced to expend approximately $280 million as a result of the problem of disappearing price-controlled crude oil and the affect of this problem on the entitlements program. Mobil says that it will be unable to recoup these losses. Moreover, if required to comply with the January entitlements notice, Mobil estimates that it would have to further satisfy unnecessary obligations of $50 million. The Court believes that it is equally clear that Mobil will not be able to recoup these additional monies if the January entitlements notice is released. *See infra* at pp. 75a-81a. The DOE's claim that plaintiff has not been irreparably harmed be-

cause the January notice has yet to be released is entirely frivolous. "The purpose of an injunction is to prevent future violations. . . ." *United States* v. *W. T. Grant*, 345 U.S. 629, 633 (1953). In the Court's view, plaintiff's alleged harm is indeed irreparable and the exhaustion doctrine ought not be applied.[27] *See Hawthorne Oil & Gas Corp.* v. *DOE*, *supra* at p. 15; *Touche Ross & Co.* v. *SEC*, 609 F.2d at 576-77 n. 11.

As just described, the Court believes that the central issue in this lawsuit is whether the DOE exceeded its statutory authority when it decided to issue post-decontrol entitlements notices that it knew were not reasonably accurate, and that would substantially and unnecessarily burden entitlements program refiners. The Court further concludes that the DOE potentially abused its discretion and acted in an arbitrary and capricious manner when it decided to issue said notices. This additional finding grows out of the DOE's mischaracterization of the status of its "investigation" into the problem of the disappearance of price-controlled crude oil. The DOE has attempted to suppress the fact that it has conducted and commissioned studies on this problem and its impact on the entitlements program. It has also sought to suppress the fact that these studies reached similar conclusions with regard to the dimensions of the problem of disappearing price-controlled crude oil, and the implications of this problem on the entitle-

[27] In view of the fact that the DOE also argued before the OHA that plaintiff's appeal would not properly lie because plaintiff had failed to exhaust its administrative remedies, plaintiff is estopped from making that same argument before this Court. *See* Transcript of March 27, 1981 hearing before OHA, case no. BEA-0630, at pp. 96, 104, 107. Moreover, the DOE's suggestion that plaintiff has not exhausted its administrative remedies because it has not petitioned for "exceptional relief" under 10 C.F.R. § 205.50 (1980) is misplaced. This regulation provides "the procedures for applying for exception from a regulation . . ." 10 C.F.R. § 205.50(a)(1) (1980). Plaintiff has not sought to be excepted from the regulations, but only that they not be manipulated by others to plaintiff's detriment.

ments program refiners. Moreover, the DOE has pretended to disguise its own failure to investigate these issues after having been put on notice of the situation at least four years ago. The Court believes that the DOE's reasonably specific knowledge of the problem of disappearing price-controlled crude and the impact that this problem was having on the entitlements program, and its failure to make reasonable efforts to remedy this situation, bears directly on the reasonableness of the DOE's decision to issue the post-decontrol entitlements notices.

Although the DOE has represented that its investigation into the problem of the disappearance of price-controlled crude is still in its infancy, and that additional time is required to formulate a policy to address the problem, this summary of the DOE's investigatory efforts is not entirely truthful. As described earlier in this Memorandum-Decision, *see supra* at pp. 25-27; at least since June of 1977 when it first received the results of a study on the disappearance of price-controlled crude oil, the DOE was placed on notice that price-controlled crude oil was disappearing from the entitlements program, and that there were several likely causes for this result. A second study of this problem was conducted the following year and the same conclusions were reached concerning the problem and its causes. Moreover, the findings of both these studies were subsequently confirmed by a report dated March 9, 1981, which was the culmination of an independent study commissioned by the DOE. It would therefore appear that based on "investigations" it has conducted already into the problem of the disappearance of price-controlled crude oil, *see supra* at pp. 25-27, and its affect on the entitlements program, the DOE has had four years to formulate a reasonable and corrective response thereto.

Unfortunately through its inaction, the DOE has not formulated such a response. Instead, it has pursued three different courses of action. First the DOE has decided to proceed full steam with the release of the post-decontrol entitlements notices, and has ignored the serious inaccuracies contained therein. Second, despite the far reaching implications

this decision has had on the entitlements program refiners, the DOE has sought to leave the impression that its decision to issue post-decontrol entitlements notices does not amount to a policy determination on these implications. The DOE has also tried to cover-up the fact that each of the studies it has conducted or commissioned on the problem and causes of disappearing price-controlled crude oil, and its impact on the entitlements program, reported virtually identical results. By conveniently ignoring this fact, and by sitting back and feigning to be aware of the problem of disappearing price-controlled crude, though ignorant of its "actual" causes and possible solutions, the DOE has attempted to fend off judicial intervention into a problem it likely caused in the first place. Furthermore, it has pursued this course all the while claiming that its expertise should be deferred to because of the complexities of the issues involved.

It may be true that the DOE will need to conduct additional investigations into the causes of the disappearance of price-controlled crude oil in order to reach a *conclusive* understanding of the problem and to be able to devise a solution thereto. However, despite the DOE's claims to the contrary, this fact bears little on the instant inquiry. For the DOE's course of conduct is potentially an abuse of discretion and arbitrary and capricious because: (1) in fact through the investigations it has completed already, the DOE does have sufficient facts within its possession to form a reasoned judgment as to whether or not post-decontrol entitlements notices should be issued. From those investigations the DOE has reasonably detailed knowledge of the extent of the problem of disappearing price-controlled crude oil, the probable causes of this problem, and the resulting harm that has been caused to entitlements program refiners. (2) The DOE has only itself to blame in failing for four years to conduct additional or conclusive investigations into the problem of disappearing price-controlled crude oil and its affect on the entitlements program. Moreover, the DOE's failure to do so must bear on the reasonableness of its stated intention to issue further entitle-

ments notices before it proceeds to complete its "investigation" of the problem of disappearing price controlled crude.

In view of the foregoing, the Court believes that the doctrine of exhaustion should not be applied. Even with the "limited" knowledge in its possession, it is unreasonable at this late date for the DOE to claim that it is not reasonably certain about the dimensions of the problem of disappearing price-controlled crude oil, the likely causes of the problem, and the impact it has on the entitlements program. If the DOE believes that additional information is required for a conclusive understanding of the situation, it has had four years within which to seek out that information. In contrast, the Court is convinced that judicial review of the reasonableness of the DOE's decision to issue post-decontrol entitlements notices is entirely appropriate at this juncture. If the Court were to defer to the DOE and require the plaintiff to further exhaust its administrative remedies, the DOE would probably continue to unfairly claim that it must be advanced additional time to investigate these problems. In short, this additional time would have the practical effect of insulating the DOE from judicial scrutiny. It should be remembered that the entitlements program is being phased-out. Thus, a review of the immediate events would take advantage of the last opportunity to possibly improve the efficiency of the administrative process.

Judicial intervention at this time would not, moreover, encourage the flouting of the administrative process. Besides the fact that the DOE would appear to be guilty of this itself, the plaintiff here seeks to realign the original intentions of the instant regulatory scheme. Furthermore, in view of the DOE's past action or non-action, exhaustion at this time would be ill-advised. It is well settled that the exhaustion requirement need not be invoked where, due to excessive delay in deciding an issue, an agency's remedy would prove inadequate. *See Walker* v. *Southern Railway*, 385 U.S. 196, 198 (1966). Any supposed remedies the DOE could eventually devise would come only after the post-decontrol entitlements notices had

already been released. However, as will be discussed *infra* at pp. 63-69, once an entitlements notice is issued and entitlements obligations have been satisfied, it is virtually impossible to "unscramble the eggs" of this process to remedy a particular refiner's claim that it has been disproportionately burdened. And since the DOE insists upon issuing the post-decontrol notices in their contemplated form without accounting for the price-controlled crude that has disappeared, it would seem that exhaustion in this case would be futile. The DOE has the authority to alter its present course of action, but appears unlikely to so in the immediate future. *See Hawthorne Oil & Gas Corp.* v. *DOE, supra* at p. 15. In sum, the DOE's motion to dismiss plaintiff's complaint on the ground of failure to exhaust administrative remedies is denied. The next issue that will be addressed is defendant's claim that plaintiff has failed to satisfy the ripeness doctrine.

The DOE also argues that plaintiff's complaint should be dismissed for failure to satisfy the ripeness doctrine. According to the DOE, the instant case is not ripe for judicial review because plaintiff is asking the Court to enjoin actions, more particularly, the issuance of post-decontrol entitlements notices, which have yet to occur. The DOE further asserts that to verify the various manipulative practices of which plaintiff complains will require the DOE to conduct "factual" investigations. Consequently, the DOE claims that this case is not ripe for judicial review. And lastly, the DOE argues that there is no final agency action capable of being reviewed. Since the investigation of plaintiff's claims have not been completed, the DOE contends that review by the Court at this time would be premature.

The ripeness doctrine is related to the exhaustion requirement because each is designed to assist a court in determining when, if at all, it should inject itself in the administrative process. *See Aquavella* v. *Richardson*, 437 F.2d 397, 402 (2d Cir. 1971). The Supreme Court described the ripeness doctrine in the case of *Abbott Laboratories* v. *Gardner*, as follows:

> [th:] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

387 U.S. at 148-49. The Supreme Court went on to explain that an issue would be fit for judicial resolution if it involved "legal" as opposed to "factual" determinations. *Id.* at 149. Moreover, the Court stated that to be fit for judicial resolution the agency's action must be "final" as interpreted in a "pragmatic way." *Id.* at 149. As for the hardship requirement, the Court held that this was satisfied if the challenged action had an immediate and substantial impact upon the complaining party. *Id.* at 150. Finally, the Court said that also to be considered is whether judicial review would impede effective enforcement of the administrative scheme. *Id.* at 154. *See also Gardner* v. *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 167 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); *Central Hudson Gas* v. *United States*, 587 F.2d 549 (2d Cir. 1978); *Nat. Resources Def. Council* v. *U.S. Nuclear Reg. Com'n*, 539 F.2d 824 (2d Cir. 1976); *Continental Airlines, Inc.* v. *CAB*, 522 F.2d 107 (D.C. Cir. 1974)(en banc); *Aquavella* v. *Richardson*, 437 F.2d 397 (2d Cir. 1971).

With regard to the instant case and whether the issues raised by plaintiff's complaint are legal or factual, as the Court's previous discussion of the doctrine of exhaustion would indicate, the issues involved here are primarily legal. Plaintiff complains that the DOE has exceeded its statutory authority and abused its discretion in issuing post-decontrol entitlements notices that it knew were not reasonably accurate. In the main, this type of determination has been interpreted to be legal in nature, *see Abbott Laboratories* v. *Gardner*,

supra at p. 149; *see generally* Administrative Law, § 49.01 (1979), and would not require the application of the DOE's expertise. *Id.* at 149; *see also Central Hudson Gas* v. *E.P.A.*, 587 F.2d 549, 558 (2d Cir. 1978); *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 927 (D.C. Cir 1976); *Aquavella* v. *Richardson*, *supra* at p. 404.

In addition, the Court believes that plaintiff has satisfied the finality element of the ripeness doctrine. According to the Supreme Court's holding in *Abbott*, agency action will be considered to be final where, for example, the promulgation of regulations by the agency "'and the expected conformity to them causes injury cognizable by a court of equity. . . .'" 387 U.S. at 150. The Court has already stated in the examination of the exhaustion doctrine that the DOE's intention to issue post-decontrol entitlements notices will be a source of immediate irreparable injury to plaintiff. *See also infra* at pp. 63-69. Moreover, based upon the information the DOE possessed as a result of their "investigations" into the problem of disappearing price-controlled crude oil, its failure to stay the issuance of the entitlements notice pending the implementation of some corrective measures to reasonably account for the price-controlled crude that has disappeared, must be deemed final action. As a primary matter, the Court need not be bound by the DOE's use of the term "investigation." In *Continental Air Lines, Inc.* v. *CAB*, 522 F.2d 107, 124 (D.C. Cir. 1974)(en banc) the court held: "The label an agency attaches to its action is not determinative. The action may be reviewable even though it is merely an announcement of a rule or policy that the agency has not yet put into effect." *See also Aquavella* v. *Richarson*, *supra* at 403. The DOE's general recalcitrance to investigate the problem of disappearing price-controlled crude, and then after having done so, to admit that it had, seems no less than a formal policy by which the DOE has sought to protect itself from being subject to judicial scrutiny. The Court believes that under the Supreme Court's "pragmatic" and "flexible" approach to the question of finality, for purposes of the present case, "the administrative

action has reached its complete development." *Abbott Laboratories* v. *Gardner, supra* 149-50; *Central Hudson Gas* v. *E.P.A.*, 587 F.2d at 558-59; *National Resoures Defense Council* v. *United States Nuclear Regulatory Commission*, 559 F.2d at 837; *Aquavella* v. *Richardson*, 437 F.2d at 404.

Plaintiff has also satisfied the "hardship" element of the ripeness doctrine. In effect, plaintiff has been faced with a Hobson's choice due to the DOE's actions in issuing the post-decontrol entitlements notices. Thus, plaintiff may either comply with the entitlements program's obligations and be forced to pay unnecessarily $50 million into the program — a sum it probably will never be able to recoup — or ignore what it considers to be the illegal application of regulations and face the possibility of both civil and criminal penalties. *See Abbott Laboratories* v. *Gardner, supra* at p. 152; *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d at 929; *Continental Airlines* v. *C.A.B.*, 522 F.2d at 126; *Aquavella* v. *Richardson*, 437 F.2d at 404. Plaintiff is also being subject to hardship within the meaning of the ripeness doctrine because of its claim that the DOE has exceeded its authority in requiring plaintiff to comply with the post-decontrol entitlements notices. *See Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 176 (1967); *Central Hudson Gas* v. *E.P.A.*; 587 F.2d at 549. The Court further notes that with the entitlements program coming to an end, this may be one of the last opportunities to review the questionable legality of the past and present operations of the program. Since plaintiff contends that billions of dollars of entitlements obligations have been improperly withheld from the program, there is a strong public interest in favor of maintaining this lawsuit. First, other refiners are probably similarly situated to plaintiff and would stand to benefit from an audit of the entitlements program. Second, the American public may also gain from this endeavor because the disappearance of price-controlled crude enables refiners to reap "windfall" profits at the public's expense. In this sense, plaintiff's lawsuit may be construed as a means by which the entitlements program may be placed once again on track. *See National Resources Defense*

Council v. *United States Nuclear Regulatory Commission*, 539 F.2d at 837; *Independent Bankers Ass'n of Am.* v. *Smith*, 534 F.2d at 929-30; *Aquavella* v. *Richardson*, 437 U.S. at 404. In conclusion, the Court believes that the instant law suit is ripe for judicial scrutiny.

The DOE further asks that the Court remand this matter pursuant to the doctrine of primary jurisdiction. According to the DOE, it is currently considering in various administrative actions the exact same issues that are now before the Court. However, the DOE asserts that plaintiff's claims require the resolution of various factual determinations that would benefit from the DOE's expertise. The DOE therefore requests that the Court retain jurisdiction over this matter, but remand it to the DOE for additional proceedings. Stated generally, the primary jurisdiction doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Nader* v. *Allegheny Airlines*, 426 U.S. 290, 303 (1976) *citing United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 63 (1956). The doctrine envisions permitting the interested administrative body to pass on those issues raised in a party's claim that are peculiarly within the competency of the agency for resolution. The benefit perceived by this process is that of encouraging the "uniformity and consistency in the regulation of the business entrusted to the particular agency." *Far East Conf.* v. *United States*, 342 U.S. 570, 574 (1952). *See also Nader* v. *Allegheny Airlines, supra* at 303-04; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). At the same time, judicial efficiency is also well-served by this doctrine:

> [the] limited functions of the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Far East Conference v. *United States, supra* at pp. 574-75. *See also United States* v. *Western Pacific R. Co.*, 352 U.S. 64, 65 (1956).

There are no hard and fast rules in applying the doctrine of primary jurisdiction. "In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." Id. at 64. Thus, where the issue involved in a case is purely legal, a court need not defer to the agency for its initial determination. *See Board of Education of City School Dist.* v. *Harris*, 622 F.2d 599, 607 (2d Cir. 1979). It has been equally well recognized that the doctrine need not be invoked where "resort to the agency would plainly be unavailing in light of its manifest opposition or because it has already evinced its 'special competance' in a manner hostile to petitioner." Id. and cases cited therein. *See also United States* v. *Western Pac. R. Co., supra* at p. 69; *Klicker* v. *Northwest Airlines*, 563 F.2d 1310, 1313 (9th Cir. 1977).

In view of the facts and issues raised in this case, it would be ill-advised to stay the instant proceedings in favor of a determination by the DOE. First, it is evident that the DOE has already exercised its "special competance" in this matter, and with a result "hostile" to plaintiff. The DOE has left little room for speculation on the question of whether it intends to issue the post-decontrol entitlements notices despite acknowledging that they are not reasonably accurate, and that they would unnecessarily and unfairly burden the entitlements program refiners. In addition, the DOE has stated the position that it is unable to "help itself" to reverse this course. As the Court indicated, this issue and the other issues raised in this litigation are purely legal in nature and best resolved by a court of law as opposed to an administrative body. *See Shell Oil Co.* v. *Nelson Oil Co., Inc.*, 627 F.2d 228, 232 (TECA 1980); *United States Tour Operators Ass'n* v. *Trans World Airlines, Inc.* 556 F.2d 126, 130 (2d Cir. 1977). These principals have a special application to the present case since

the DOE has been accused of exceeding its statutory authority and of having abused its discretion.

Moreover, the DOE's reluctance over the past four years to address the issues raised herein in a more meaningful fashion further militates against staying these proceedings. Four years seems sufficient time for the DOE to have developed a corrective "uniform policy" to those concerns raised by plaintiff's complaint. And finally to be considered is plaintiff's assertion that it has and will continue to suffer irreparable harm as a result of the DOE's stated intention to issue the post-decontrol entitlements notices. A stay of the instant proceedings will merely make the harm plaintiff alleges accomplished fact. In conclusion, defendants' motion to dismiss plaintiff's complaint or to stay the Court's proceedings in this case are denied in all respects. The Court turns now to address the merits of plaintiff's motion for a preliminary injunction.

V.

Mobil claims that it is entitled to a preliminary injunction to enjoin the issuance of the January entitlements notice. According to Mobil, the DOE has exceeded its statutory authority and abused its discretion by issuing post-decontrol entitlements notices, such as the one for January, that fail to account for all the price-controlled crude oil produced and sold between the commencement of the entitlements program on November 1, 1974, and the date of decontrol of the petroleum industry on January 28, 1981. In so acting, plaintiff Mobil claims that the DOE has distorted the purpose of the entitlements program, which is to equitably distribute the economic benefits of having access to cheaper price-controlled crude oil. Mobil also asserts that this purpose has been subjugated through the non-action of the DOE in permitting certain refiners to manipulate the reporting of crude oil receipts so as to avoid the entitlements obligations. In addition, Mobil argues that for similar reasons as those above, the DOE has ignored the considered objectives of the Emergency Petroleum Allocation Act, *as amended*, 15 U.S.C. § 753(b)(1),

which is the basis of the DOE's regulatory authority. And finally, Mobil contends that the failure of the post-decontrol entitlements notices to account for all of the price-controlled crude produced and sold during the course of the entitlements program, is in contravention of President Reagan's Executive Order No. 12287, 46 Fed. Reg. 9909 (January 28, 1981).

In response, the DOE argues that plaintiff is attempting to invalidate a regulatory scheme that has been upheld in the courts as being a proper exercise of statutory authority, and a reasonable exercise of the DOE's discretion. The DOE maintains that even assuming that plaintiff's claims of the existence of manipulative practices are correct, this problem is best handled by corrective rulemaking by the DOE, and by increasing enforcement efforts. As for the plaintiff's allegation that the purposes of the entitlements program have been undermined by the disappearance of crude oil, the DOE demurs and asserts that the program's purposes are still being served by the present manner in which it is being operated. The DOE states that a key purpose of the entitlements program is to equalize the "average weighted crude oil costs of all refiners, thereby eliminating the inequities caused by the 'two tier' pricing system." *Pasco, Inc.* v. *Federal Energy Administration*, 525 F.2d 1391, 1395 (TECA 1975). As such, the DOE contends that this purpose may be served no matter how much price-controlled crude oil remains in the program. The DOE argues that the reduction in volume of price-controlled crude oil in the program does not affect the relative positions of the participating refiners, any more than some individuals' efforts to avoid taxes increases the burden on other taxpayers.

In any event, the DOE asserts that pursuant to applicable regulations, it has no choice but to issue the entitlements notices whatever the accuracy of the data they are based upon. The DOE also argues that the President's Executive Order No. 12287 merely requires the orderly phasing-in of decontrol, and does not provide for the retroactive invalidation of the entitlements program to the extent that notices covering time periods before the effective date of the Order

are somehow invalidated by it. In sum, the DOE believes that Mobil seeks no less than to "blackmail the agency into writing a regulation which would retroactively amend the entire program to Mobil's benefit." Defendants' Supplemental Memorandum on Motion to Dismiss, at p. 7. The DOE urges that the Court not permit itself to be a party to those efforts.

In addressing plaintiff's claims certain general principles must be kept in mind. The first is the applicable standard by which a preliminary injunction may issue. To be entitled to a preliminary injunction a plaintiff must demonstrate (1) probable success on the merits and possible irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting relief. *See Buffalo Forge Co.* v. *Ampco-Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981); *Petraco-Valley Oil* v. *DOE*, 633 F.2d 184, 194 (TECA 1980); *Carey* v. *Klutznick*, 637 F.2d 834, 837 (2d Cir. 1980); *Jackson Dairy, Inc.* v. *H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir. 1979); *see also Sampson* v. *Murray*, 415 U.S. 61, 88 n.59 (1974). With regard to plaintiff's claim that the DOE has exceeded its statutory authority, the Court must, of course, examine the limits of the DOE's authority and compare them with the DOE's actions as shown by the evidence. *See* 15 U.S.C. § 706(2)(c)(J); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 403, 416 (1971). A more clearly defined standard, however, is involved in plaintiff's allegations that the DOE has abused its discretion and acted in an arbitrary and capricious manner. *See* 15 U.S.C. § 706(2)(A). As the Supreme Court held in *Bowman Transportation* v. *Arl.-Best Freight System*, 419 U.S. 281, 285 (1974):

> Under the 'arbitrary and capricious' standard the scope of review is a narrow one. A reviewing court must 'consider whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.' *Citizens to Preserve Overton Park* v.

> *Volpe, supra,* at 416. The agency must articulate a 'rational connection between the facts found and the choice made.' *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962). While we may not supply a reasoned basis for the agency's action that the agency itself has not given, *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947), we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 595 (1945).

See also Mobil Oil v. *DOE,* 610 F.2d 796, 801 (TECA 1979); *Office of Communication* v. *FCC,* 560 F.2d 529, 532 (2d Cir. 1977). More specifically, with regard to statutory construction, normally weight will be given to an agency's interpretation of its own enabling legislation, although the judiciary is the final authority on issues of statutory construction. *See Katherine Gibbs School* v. *FTC,* 612 F.2d 658, 664 (2d Cir. 1979), *citing Volkswagenwerk Aktiengesellschaft* v. *FMC,* 390 U.S. 261, 272 (1968); *Manchester Environment Coalition* v. *EPA,* 612 F.2d 56, 58 (2d Cir. 1979); *Basin, Inc.* v. *FEA,* 552 F.2d 931, 934 (TECA 1977). Still, an agency interpretation only must be granted great deference when it is consistent with the congressional purpose, and when there are no compelling indications that it is wrong. *Katherine Gibbs School* v. *FTC, supra* at 664; *Basin, Inc.* v. *FEA, supra* at 934; (no reasonable basis in law). With these doctrines in mind the Court will now examine the merits of plaintiff's claim for a preliminary injunction.

The Court's inquiry into the merits of plaintiff's claims, must begin first with a re-examination of the legislative history of the Emergency Petroleum Allocation Act (EPAA) *as amended,* 15 U.S.C. § 753 *et. seq.,* which is the enabling statute for the entitlements program. *See* 39 Fed. Reg. 39740 (November 11, 1974). Pursuant to the EPAA, regulations promulgated thereunder shall *inter alia* "to the maximum extent practicable," 15 U.S.C. § 753(b)(1), provide for the "preservation of an economically sound and competitive petroleum industry," 15 U.S.C. § 753(b)(1)(F), the "equitable distribu-

tion of crude oil . . . and refined petroleum products at equitable prices," *id.*, "economic efficiency," 15 U.S.C. § 753(b)(1)(H), and the "minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." 15 U.S.C. § 753(B)(1)(I). From these roots sprang the entitlements program whose purpose is more specifically described in its legislative history:

> In large measure, the goal of the proposal is to improve the access of small and independent refiners to old domestic oil. In addition, however, the proposed program is also designed effectively to provide all refiners with proportionate amounts of old oil, based on their relative refinery capacities. The proposed program is accordingly aimed not only at bringing the small and independent refining sector as a class into a more competitive position with respect to the majors, but it is also specifically designed to assure that all segments of the petroleum industry will benefit equally from lower-priced domestic oil. . . . This goal is consistent with the Congressional objectives of achieving equitable distribution of crude oil at equitable prices among all sectors of the petroleum industry and preserving an economically sound and competitive petroleum industry.

39 Fed. Reg. 39740 (November 11, 1974).

Upon juxtaposing both the intent of the enabling Act, and the legislative history of the entitlements program, it is apparent that the only possible means by which "equitable distribution" of price-controlled crude could be accomplished "to the maximum extent practicable," would be to guarantee the "access" of "all refiners" to "proportionate amounts of old oil based on their relative refinery capacities" such that they could "equally benefit from lower priced domestic oil." Obviously, if price-controlled crude oil, for some reason, was not funneled through the entitlements program and accounted for in the monthly entitlements notices, then the fundamental purpose of the program to "equitably distribute"

price-controlled crude oil would be lost entirely. This observation is based, not on niceties of statutory construction, but on practical fact.

Unfortunately, the unthinkable has occurred. Evidence submitted to the Court by plaintiff and, significantly, not disputed by the DOE conclusively demonstrates that at least since 1977 significant quantities of price-controlled crude oil have disappeared from the entitlements program only to reappear as more expensive uncontrolled crude, or to have simply vanished from the program altogether. Plaintiff has also demonstrated convincingly that decontrol, whether in its gradual form as announced by President Carter on April 5, 1979, or as completed by President Reagan on January 28, 1981, has had a certain speculative impact on the problem of disappearing price-controlled crude oil. The fastest rates at which price-controlled crude oil disappeared can be traced for similar reasons to these two dates. Spurred on by the incentive of the great price-differential between price-controlled and uncontrolled crude oil, the announcement of the eventual decontrol of the petroleum industry immediately encouraged refiners to hoard as much price-controlled crude as possible outside of the entitlements program for its eventual sale after decontrol. President Reagan's election brought with it the promise that decontrol would arrive even earlier than its originally scheduled date of October 1, 1981, and that profits could be taken sooner as well. This would explain why the most dramatic figures for the rates of disappearance are seen so far in November and December of 1980 (more recent statistics have yet to be released) when crude oil disappeared at the rate of 14 and 29 million barrels a month. These two months alone combine to produce lost entitlements obligations of over $1.1 *billion*. However, the total figures for the years 1979 and 1980 are simply staggering. For in these two years over 250.3 million barrels of crude oil disappeared from the entitlements program with a total entitlements value of $5.6 *billion*.

Plaintiff demonstrated in more specific terms, both independently and with the considerable aid of the DOE's own

1981 study of the problem, the likely methods by which price-controlled crude was made to disappear, and the exact ways in which the disappearance of price-controlled crude affected the entitlements program. Of all the possible reasons for the disappearance of price-controlled crude, the two most probable explanations for the disappearance phenomenon are miscertification and manipulative inventorying. Of the two, however, it would seem that the latter accounts for most of the price-controlled crude that has disappeared. This is primarily because manipulative inventorying is legal under the entitlements program regulations, and traditionally has been used by the industry for profit maximization since the inception of the program. Miscertification is not a legal act, and there would be little incentive to employ this method when the legal use of manipulative inventorying practices produces as "satisfactory" a result. Obviously, profiteering under either of these methods is repugnant to the purposes of the entitlements program because it puts a disproportionate burden on those refiners that honestly shoulder their entitlements obligations, and places them at a competitive disadvantage.

Plaintiff also demonstrated in specific terms how this disappearance of price-controlled crude oil burdened the entitlements program refiners. The disappearance of price-controlled crude causes the DOSR to shrink, thereby causing less entitlements to be issued. The result to entitlements purchasers is that they are issued fewer entitlements overall, and must therefore make up for this decrease by purchasing additional amounts. In much the same manner, entitlements sellers are negatively affected by the disappearance because they are issued fewer entitlements as a result of the shrinking DOSR, and accordingly will have less entitlements to sell to make up for their comparatively limited access to price-controlled crude. Mobil's witness testified that, as a traditional entitlements purchaser, Mobil incurred additional entitlements burdens of $64 million in 1979, and $220 million of unnecessary entitlements obligations in 1980. Moreover, Mobil estimates that if the January 1981 entitlements notice is

released in its contemplated form, Mobil will continue to incur unnecessary entitlements obligations of approximately $50 million. It should be remembered that every barrel of price-controlled crude that disappears and later reappears as higher priced uncontrolled crude, represents additional costs that may be passed on to the American public.

The DOE does not contest that refiners such as Mobil have been required to in effect suffer a multi-million dollar penalty as a result of the disappearance of price-controlled crude oil, and the DOE's continued practice of issuing entitlements notices that do not account for this missing crude. Neither can it be disputed by the DOE that it has known about the problem for at least four years. But it is equally apparent that the record is pathetically silent with regard to any efforts made by the DOE to correct the problem of disappearing price-controlled crude oil, or to ameliorate the harm this problem has caused and continues to cause entitlements program refiners. To the contrary, the DOE has insisted upon aggravating this problem, first, by ignoring it, and second, by the issue of post-decontrol entitlements notices that do not account for the price-controlled crude that has disappeared. In view of the fact that these notices are not reasonably accurate, and continue to burden entitlement program refiners substantially and unnecessarily by failing to "equitably distribute" the benefits of price-controlled crude, the DOE has illegally exceeded its statutory authority.

More specifically, the entitlements program as presently operated, intrinsically contradicts its stated purpose as expressed in the EPAA, and the legislative history of the program's regulations. The entitlements program survived previous challenges to its rationality and the authority of the FEA to enact the program, based on the "urgent need" to act in order to correct the supply and pricing inequities caused by the aftermath of the Arab embargo, and the "implementing agency's program for achieving the varied objectives of the [EPAA]." *Pasco, Inc.* v. *FEA*, 525 F.2d 1391, 1402 (TECA 1975); *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1022 (TECA 1975) (pro-

gram serves objectives of the EPPA "to maximum extent practicable"). Today, the program does not face a crisis from without as much as one from within. The disappearance of price-controlled crude from the entitlements program undermines the "equitable distribution" of this crude oil, and fails to "assure that all segments of the petroleum industry will benefit equally from lower-priced domestic oil" to "the maximum extent practicable." Moreover, the disappearance of price-controlled crude illserves the objective of "preserving an economically sound and competitive petroleum industry." And despite the DOE's contention, the entitlements program was intended to equitably distribute the benefits of price-controlled crude, not the burdens associated with its disappearance.

The Court also believes that the DOE has abused its discretion and acted in an arbitrary and capricious manner by the issuance of post-decontrol entitlements notices that fail to account for all of the price-controlled crude produced during the life of the entitlements program. Through its own investigations into the disappearance of price-controlled crude oil, the DOE has acquired reasonably sufficient knowledge of this problem, its causes, and the unnecessary and substantial burden that befalls entitlements program refiners as a result. In view of this knowledge, the reasonableness of the DOE's decision to issue post-decontrol entitlements notices without first addressing these concerns and taking corrective action must be seriously questioned. The DOE was clearly aware that these entitlements notices, as those that had been issued before, would not be reasonably accurate because of the large quantities of price-controlled crude oil that has disappeared, and that therefore could not be accounted for in the monthly entitlements allocations and notices. Similarly, the DOE's decision to issue these post-decontrol entitlements notices is equally irrational in view of the fact that the DOE has had four years since it learned of the problem of disappearing crude oil to take corrective measures.

Since 1977 when the DOE conducted its first study of the problem of disappearing price-controlled crude oil, it has been put on notice of the extent of this problem, its probable causes, and the implications they have had for the entitlements program. The DOE conducted or commissioned two other studies on the problem of disappearing price-controlled crude in 1978 and 1980-81. Each of these studies reported similar conclusions about the extent of the disappearance of price-controlled crude oil and the probable causes of this problem. As the Court's previous discussion of these studies indicate, *see supra* at pp. 26-28, the primary causes of the disappearance of price-controlled crude as identified in the 1977 and 1978 studies were attributable to reporting errors and regulatory loopholes. This list has been further narrowed by the most recent study of March 9, 1981, which points to the use of manipulative inventory practices as the primary cause of the disappearance of price-controlled crude.

The implications of this finding are especially significant in terms of the specific purposes of the entitlements program. The practice of manipulative inventorying is at direct cross-purposes with the entitlements program. While the entitlements program is intended to "equitably distribute" the benefits of price-controlled crude, the plain design of manipulative inventorying is to hoard stocks of price-controlled crude for self-gain. And although the entitlements program seeks to encourage "access" to price-controlled crude, manipulative inventory practices cause just the opposite effect. Furthermore, the entitlements program is designed "to provide all refiners with proportionate amounts of old oil, based on their relative refinery capacities." Manipulative inventorying, on the other hand, results in some refiners reaping a disproportionate benefit. Price-controlled crude oil that has disappeared, for example, by virtue of a "time exchange," will prevent the cost benefits associated with that crude from being "equitably distributed" to all refiners in the entitlements program. Finally, manipulative inventorying serves directly to promote "unnecessary interference with market mechan-

isms," and subverts the goals of "preserving an economically sound and competitive petroleum industry."

Although aware of this situation for the past four years, the DOE has done virtually nothing to prevent the use of manipulative inventorying, or to seek out those refiners who have sought to gain from such practices. Quite the contrary, by its stated intention to issue post-decontrol entitlements notices that do not fairly reflect all stocks of price-controlled crude oil produced and sold in the entitlements program, the DOE has clearly encouraged both the practice of manipulative inventorying and the disappearance of price-controlled crude, by providing refiners with the tacit assurance that they will not be sought out and be made to account for their actions. With the knowledge that the purposes of the EPAA and the entitlements program were being subverted, the DOE had an affirmative obligation to stay the issuance of any entitlements notice until all of the price-controlled crude could be accounted for. The DOE's failure to do so amounts to a breach of its affirmative duty both under the EPAA to serve the objectives stated therein "to the maximum extent practicable," and under the specific purposes of the entitlements program.

A similar situation to that addressed by the Court today arose in *United Steelworkers of America* v. *Marshall*, No. 79-1048 (D.C. Cir. January 30, 1981), which involved a challenge to the validity of a standard under the Occupational Safety and Health Act. On the issue of whether the agency had an obligation to amend its standards in view of changed circumstances, the court held:

> where time does demonstrate the infeasibility of a standard once approved as feasible, so that the very predicate for the original rule and its statutory basis have disappeared, a court may well be able to deny the agency any discretion to refuse a new rulemaking.

slip op. at p. 162.[28] This rule was also enunciated in *Geller* v.

[28] While the DOE claims that it has not "refused" a rulemaking on the issues raised by plaintiff's complaint, the Court believes that in effect the DOE actions must be deemed a refusal.

FCC, 610 F.2d 973 (D.C. Cir. 1979)(per curiam). There the court considered whether the FCC abused its authority in refusing to re-examine certain regulations that were adopted on the basis of a "consensus agreement," in light of recently passed copyright legislation, which affected the regulations in question. The Court found that the FCC erred in declining to institute a rulemaking:

> Undeniably, an agency normally possesses a generous measure of discretion respecting the launching of rulemaking proceedings. But though the discretion typically is broad, its exercise is reviewable if plainly misguided. Already this court has twice applied that principle to vacate agency orders rejecting requests for rulemaking on the mistaken ground that the agency lacked jurisdiction to promulgate the regulations proposed. And it goes without saying that the agency cannot sidestep a reexamination of particular regulations when abnormal circumstances make that course imperative. That, we think, was the situation here. While the procedural vehicle Geller utilized was a petition for rulemaking, the far more important fact was that its allegations served to alert the Commission to the possibility that the regulations imported from the consensus agreement lacked a nexus with the public interest once the sought-after revision of the copyright laws was accomplished.

Id. at 979 (footnotes omitted).[29]

In the instant case, the Court believes that the DOE has also "sidestepped" its administrative responsibilities by failing to reexamine the reasonableness of issuing post-decontrol entitlements notices, despite the mounting problem of disappearing price-controlled crude oil. The DOE has been amply informed about the extent of this problem, and having had

[29] Furthermore, the DOE is inaccurate when it states that the *Geller* court did not rule on the question of changed circumstances. *See* 610 F.2d at 978 n.39.

four years to act upon it, is estopped to deny that it has had sufficient time within which to consider some form of corrective measure. In fact, it has gone to the other extreme by its continued intention to issue post-decontrol entitlements notices. The only effect of this course will be to exacerbate the problem of disappearing price-controlled crude, and the burden falling upon those refiners that do not use manipulative inventory practices to cheat or "game" the entitlements program. By so acting, the DOE has abused its discretion and has made a clear error in judgment.

This conclusion is particularly appropriate in view of the purposes of President Reagan's Executive Order No. 12287, which decontrolled the petroleum industry. Section 1 of the Executive Order rescinds all price and allocation controls. In addition, pursuant to Section 3 of the Executive Order, the Secretary of the DOE:

> *may* . . . adopt such regulations and take such actions as he deems necessary to implement this Order, including the promulgation of entitlements notices for periods prior to this Order and the establishment of a mechanism for entitlements adjustments for periods prior to this Order.

46 Fed. Reg. 9909 (January 30, 1981) (emphasis supplied). Also relevant to the instant discussion is Section 4 of the Executive Order, which states that the Secretary "is authorized to take such other actions as he deems necessary to ensure the purposes of this Order are effectuated." It is plain from even a cursory reading of these provisions that the DOE is not compelled, as it claims, to issue an entitlements notice that does not reasonably reflect production of price-controlled crude for that month. Moreover, contrary to the DOE's position, the Executive Order specifically refers to the issuance of entitlements notices that cover periods of time "prior to this Order." Thus, pursuant to the Executive Order, retroactive entitlements notices are to be employed to effectuate the purposes of the "orderly decontrol of crude oil and refined petroleum products." *See* Preamble of Executive Order No. 12287.

More specifically, it would seem that the Executive Order in fact places an affirmative duty on the part of the DOE to monitor the transition to decontrol and assure that it proceeds in an orderly fashion. The DOE's present course of action in issuing post-decontrol entitlements notices which it knows are not reasonably accurate, would contravene the principles set forth in the Executive Order. The issuance of these post-decontrol entitlements notices as presently contemplated will undermine the orderly processes of decontrol, by permitting some refiners to cheat and "game" the entitlements program at the expense of the other participating refiners, and the American public as well. In fact the vast majority of price-controlled crude that has disappeared has done so in the expectation of decontrol. The provisions of the Executive Order mandate a much different result.

In addition, the Executive Order, which envisions the gradual dismantling of the entitlements program, would further require the full accounting for all price-controlled crude produced and sold during the course of the program, before this dismantling had been completed. Consequently, the failure of the Secretary to exercise his discretion to stay the issuance of post-decontrol entitlements notices which do not reasonably reflect all price-controlled crude produced during the life of the entitlements program would violate the requirements of Executive Order No. 12287, and would be an abuse of discretion, and arbitrary and capricious. Furthermore, the failure of the Secretary to promulgate appropriate regulations that would account for the disappearance of price-controlled crude produced between November 1, 1974 and January 28, 1981, is also violative of the provisions of Executive Order No. 12287, and is an abuse of discretion and arbitrary and capricious. In sum, the Court believes that plaintiff has shown probable success on the merits. The next issue to be considered is whether plaintiff will suffer possible irreparable injury as a result of the DOE's actions.

VI.

Plaintiff claims that it will suffer irreparable harm if the DOE is permitted to issue post-decontrol entitlements notices

without first accounting for all of the price-controlled crude oil that has been produced and sold during the entitlements program. First, Mobil asserts that it will suffer irreparable monetary loss. According to Mobil, it will be unable to ever recover the millions of dollars it will be forced to spend for entitlements under an illegal entitlements notice. It says that refiners that have sold entitlements under the notice will have spent and relied upon the revenues received in such sales of entitlements by the time any corrective action is taken. In addition, Mobil alleges that many of these refiners have gone bankrupt and could not be forced to make restitution. As an example, Mobil claims that for the month of February 1980, approximately 40% of the entitlements it purchased that month, or approximately $18 million, were paid to companies that have since filed for bankruptcy or gone bankrupt. *See* Affidavit of Roy K. Murdock, dated May 18, 1981. Furthermore, Mobil maintains that under similar circumstances in the past, the DOE has refused to make refiners pay back entitlements revenues that had been improperly received, or has stopped short of requiring the refiner to make full restitution. Thus, says Mobil, it is unlikely that it will be made whole should the Court subsequently determine that Mobil has been illegally required to comply with the post-decontrol entitlements notices.

Second, Mobil argues that if it were to attempt to avoid the irreparable injury caused by compliance with an entitlements notice, its only option would be to refuse to comply. However, Mobil states that this course of action would subject it to civil liability of $20,000 per day for each day of noncompliance, and criminal liability of imprisonment for one year and a fine of $40,000 per day for each day of noncompliance. *See* EPAA § 5, 15 U.S.C. § 754; 10 C.F.R. §§ 205.203(a)(2), (b)(1)(A), (c)(1)(B). And finally, Mobil says that the issuance of a preliminary injunction would be in the public interest because it would serve to restore the fundamental purposes of the entitlements program through an accounting of all of the price-controlled crude oil that has disappeared from the program.

The DOE counters and argues that Mobil could not possibly suffer irreparable harm as a result of the issuance of any post-decontrol entitlements notice. First, the DOE asserts that threatened monetary loss could never amount to irreparable harm because Mobil would eventually be able to recover such losses at a later date. Moreover, the DOE contends that this Court could readily invoke its equity powers and fashion a remedy if for some reason Mobil could not recover its monetary losses directly from the refiners involved. In any event, says the DOE, it will eventually issue a "clean-up" entitlements notice that will account for any inequities suffered by participating refiners in the entitlements program before it is totally phased out. *See* 46 Fed. Reg. 15112 (March 3, 1981); 46 Fed. Reg. 23755 (April 28, 1981). The DOE also asserts that substantial harm will be caused to third parties if an injunction is issued. First, many refiners are heavily reliant on receipts of decontrolled crude, and would suffer if the January entitlements notice is enjoined from being issued. Also cited by the DOE is the administrative inconvenience that it would be caused if the post-decontrol entitlements notices were enjoined. If so encumbered, the DOE contends that it would be unable to fulfill its mandated responsibilities under Executive Order No. 12287.

The Court believes that plaintiff will suffer irreparable harm if the DOE issues its post-decontrol entitlements notices. Short of enjoining the DOE from issuing the pending January entitlements notice, it is virtually impossible, as a result of the unique provisions of the entitlements program, for plaintiff to be afforded any meaningful protection from the loss of approximately $50 million it would be illegally obligated for under the DOE's January notice. As previously described, entitlements obligations are not paid into the DOE, nor does it administer the actual transfer of funds under this program. Instead, the DOE simply imposes the entitlements obligations and under applicable regulations refiners are required to purchase or sell entitlements in accordance with the DOE's monthly notice. *See* 10 C.F.R. 211.67(b) (1980). In short, the

DOE is severely hamstrung both legally and as a practical matter, in terms of the possible forms and extent of relief that it can order, to remedy a claim such as Mobil's. Possibly it is for this reason that the DOE has failed to make any specific suggestions with regard to what form of relief this Court could fashion to protect Mobil from irreparable harm. Neither could Mobil readily turn to a specific refiner and sue to recover illegally transferred entitlements obligations. As a primary matter, the Court knows of no case, and the parties have cited none, which involved the factual situation before the Court today. The possible claims and counterclaims that could be made in such an action would seem more appropriately resolved in a law school classroom than in a court of law. Moreover, it genuinely appears that even if Mobil did pursue such an action they would be unable to recover a substantial portion of their illegally paid monies because of the financial health of many of their traditional entitlements trading partners. *See* Affidavit of Roy K. Murdock, dated May 18, 1981. This is not the speculative claim the DOE would have it be.

In addition, the proposed rulemaking which envisions the adoption of a final entitlements program adjustment mechanism would not go very far toward remedying plaintiff's impending monetary loss. *See* 46 Fed. Reg. 15112 (March 3, 1981). The proposed mechanism is designed to perform the very mechanical task of permitting adjustments and corrections to be made after the final entitlements notice which had been scheduled to be issued in March 1981, but which has been enjoined by various courts around the country from being released. This is the same type of function an entitlements notice had performed month after month, as discussed *supra* at p. 8, prior to decontrol. Because the entitlements notice mechanism was disbanded after the date of decontrol, the DOE decided that some mechanism was necessary to cover the adjustments and corrections for periods prior to January 28, 1981. Significantly, the proposed rulemaking makes no mention of the problem of the disappearance of

price-controlled crude, and the necessity of adopting some form of final accounting in view of this problem. And it is clear from a review of the proposed rulemaking that it was never intended to remedy the burden imposed on entitlements program refiners as a result of the disappearance of price-controlled crude oil. As further evidence of this fact, according to the rulemaking, the post-decontrol adjustment mechanism would include a provision for an escrow account in the sum of $50 million to satisfy the various adjustments and corrections required. This escrow account is to be funded by monies paid in by all entitlements program refiners. Consequently, if Mobil ever attempted to recoup from the escrow account the $50 million it claims it lost due to the illegal use of manipulative inventory practices, the entire fund would have to be paid over to Mobil, part of which would have come out of Mobil's coffers to begin with.

By now it should become apparent, even to the DOE, that Mobil may rely on no other form of remedy except for injunctive relief. Moreover, the DOE misstates the law when it says that mere monetary damages would not entitle the plaintiff to injunctive relief. As a historical matter, a court's equity powers have always been properly invoked when no other form of remedy was available to the plaintiff, and as a consequence, immediate irreparable harm was threatened. *See* 7 Moore's *Federal Practice*, ¶ 65.18[3]. The Supreme Court defined the term "irreparable" as follows:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. *Murray*, 415 U.S. 61, 90 (1974) (emphasis in text)(footnote omitted) *citing Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Studebaker Corp.* v. *Gittlin*, 360 F.2d 692, 698 (2d Cir.

1966)(plaintiff is not "required to show that otherwise rigor mortis will set in forthwith")(Friendly, J.). As the above discussion of plaintiff's available remedies indicates, no means of compensation would be available at a later date to remedy plaintiff's threatened harm. Thus, plaintiff is faced with the impossible choice of either refusing to comply with its entitlements obligations and face civil and criminal liability, or to comply and suffer the permanent loss of income and therefore irreparable injury.

A balancing of the various interests involved in this case also weighs in favor of granting plaintiff injunctive relief. Plaintiff's complaint alleges the scandalous mismanagement of a billion dollar government program with far reaching implications for both the petroleum industry and the American public as well. With the advent of decontrol, the DOE's mission is, for the most part, soon to end. The instant case represents one of the last opportunities to ensure that the DOE has lived up to its mandated obligations as required by the EPAA, the purpose of the entitlements program, and President Reagan's Executive Order No. 12287. The credible evidence produced before this Court would suggest that the DOE has not fulfilled those obligations. In view of this fact, injunctive relief would serve the public interest until such time as the DOE can be made to rectify its present course.

The only possible "harm" accruing to the DOE if an injunction is issued would be to require it to act in accordance with the original intention of the entitlements program and the EPAA. The Court appreciates that some third party entitlements sellers may be temporarily inconvenienced by the Court's action today, since an injunction against the January entitlements notice will hold up the transfer of entitlements that they have come to rely upon every month. Of course, any harm that they would suffer must be balanced against that of Mobil's, and of those refiners similarly situated to it, who have collectively expended billions of dollars of their own funds unnecessarily, and in disproportion to those refiners

who have cheated and "gamed" the entitlements program for their own gain. But even if some third party refiners are temporarily inconvenienced, their purported right to continue to benefit from an apparently mismanaged government program must be junior to the right of those refiners such as Mobil, who also seek to claim the same benefit, by restoration of the program to its original intention.

Having determined that plaintiff has shown probable success on the merits and possible irreparable injury, the next question to be addressed by the Court is the scope of the preliminary injunction order. Plaintiff's underlying claim seeks a final accounting of all of the price-controlled crude oil that has been produced during the course of the entitlements program, as a remedy for the fact that millions of barrels of price-controlled crude have disappeared, and the added expense plaintiff has incurred as a result. It would appear that plaintiff's immediate intention in the instant motion was to preserve the status quo by moving to enjoin the January entitlements notice. This effort was made due to the growing and persistent nature of the problem of disappearing price-controlled crude in the final months of the entitlements program. Specifically, by enjoining the issuance of the January entitlements notice, those refiners who were engaged in cheating or "gaming" the program would be prevented from succeeding in their plans, and plaintiff would be saved the added burden of complying with an entitlements notice that continued to reflect the disappearance of millions of barrels of price-controlled crude.

The DOE has raised the question of whether this Court has the power to enjoin the issuance of the January entitlements notice under the relevant provisions of Section 211 of the Economic Stabilization Act (ESA), 12 U.S.C. § 1904, note, as incorporated by Section 5(a)(1) of the EPAA, 15 U.S.C. § 754(1)(1). In relevant part, Section 211(d)(2) of the ESA provides:

> A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or

> permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it.

Section (e)(1) further provides:

> *Except as provided in subsection (d)* of this section, no interlocutory or permanent injunction restraining the enforcement operation or execution of this title, or any order or regulation issued thereunder, shall be granted by any district court of the United States or judge thereof.

Thus, according to the DOE, while the Court may enjoin the issuance of the January entitlements notice in terms of its affect on plaintiff, the Court would be without jurisdiction to enjoin the notice and its affect on any third party. The Court disagrees.

The ESA as amended by 12 U.S.C. § 1904 note, was enacted for the purpose of stabilizing the inflationary spiral in the early 1970's, by placing price controls on wages, salaries, rents, and corporate dividends. *See* [1971] U.S. Code Cong. & Ad. News 2283. Under the ESA the President was given the authority to delegate the various responsibilites to enact such price controls to the interested agencies. While the agencies were provided with specific guidelines in enacting regulations under the ESA, a judicial review mechanism was also provided. The purpose of this measure was stated as follows:

> Any person suffering legal wrong because of any act or practice rising out of the operation of this Act or because of any regulation or order issued under the Act may bring an action in a Federal district court, without regard to the amount in controversy, and may seek all appropriate relief including a declaratory judgment, an injunction (except as limited by the provisions of Section 211 of this Act), or damages.

Id. at p. 2291. Thus, for example, where a meat packers association objected to the manner in which a meat price ceiling regulation pertained to their particular operations, the relevant regulatory agency could be sued under Section 211. *See*

e.g. Western States Meat Packers Ass'n, Inc. v. *Dunlop*, 482 F. 2d 1401 (TECA 1973). However, under the provisions of Section 211(d)(2), the disputed regulation could not be enjoined as against all persons subject to its provisions, but only to the plaintiff(s) before the court. It was thought that this method of judicial review would serve the "speed and consistency" of decisions arising under the ESA, would avoid any "breaks or stays in the operation of the program," and at the same time permit the aggrieved person to pursue judicial relief. [1971] U.S. Code Cong. & Ad. News 2292.

While on its face, Section 211(d)(2) would appear to limit the power of this Court to enjoin the entitlements program beyond that of its affect on the plaintiff in this action, the purpose of this provision demonstrates without doubt that it has absolutely no applicability to the instant proceeding. Plaintiff does not challenge the validity of the entitlements program as enacted under the ESA. Rather, plaintiff has brought suit charging the DOE with gross mismanagement of the program to the extent that the purposes of the program and the EPAA are being undermined. At issue is the fundamental ability of plaintiff to seek restitution for millions of dollars worth of obligations incurred under a government program, which has been supervised by an agency that has conceded such payments were unnecessary and unfair.

Curiously, that same agency would have the plaintiff be left with no meaningful remedy to recoup these losses. At present, the DOE does not know which refiners out of the three hundred that have participated in the entitlements program, were responsible for the millions of barrels of price-controlled crude that have disappeared from the entitlements program. Neither could the DOE claim that those same refiners, whoever they are, would not abscond with still more price-controlled crude with the issuance of the January entitlements notice, and thereby further injure plaintiff. Until such time as the DOE can reasonably resolve each of these questions, an injunction should properly issue to prevent the exacerbation of plaintiff's injury, and the dismantling of the entitlements program before all price-controlled crude oil produced during

the course of the entitlements program is accounted for. Only in this manner will the purposes of the entitlements program, the objectives of the EPAA, and Executive Order No. 12287 be served. A ruling to the contrary would only serve those who have thus far denigrated these principles with impunity.

Fortunately, basic principles of statutory construction would not compel this result or the Court to read Section 211 literally. As held by the Supreme Court in *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978):

> This Court, in interpreting the words of a statute, has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute' . . . [but] it is otherwise 'where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act. . . .'" *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965) (citations omitted).

These principles were addressed more recently in *In re Adamo*, 619 F.2d 216, 222 (2d Cir. 1980), where the Court stated as follows:

> It is a well established principle of statutory construction that a statute should not be applied strictly in accord with its literal meaning where to do so would pervert its manifest purpose. Nowhere has this principle been expressed more eloquently than by Judge Learned Hand in his concurring opinion in *Guiseppi* v. *Walling*, 144 F.2d 608, 624 (2d Cir. 1944) where he stated:
>
> > There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and although their words are by

far the most decisive evidence of what they would have done, they are by no means final.

See also Peter Pan Fabrics, Inc. v. *Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960); *Federal Deposit Insurance Corp.* v. *Tremaine*, 133 F.2d 827, 830 (2d Cir. 1943).

In the instant case, this Court would be compelled to just such an absurd result if it were to hold that Section 211(d)(2) would preclude the grant of a preliminary injunction to prevent the DOE from issuing the January entitlements notice. The harm of which plaintiff complains was clearly not anticipated by the framers of Section 211. But it is only reasonable to imagine that they would have desired the Court to issue an injunction where it would serve the purposes of the EPAA and the regulations promulgated thereunder, rather than deny such an injunction and give aid and comfort to those who would subvert its purposes. As an alternative holding, the Court believes that a preliminary injunction should rightfully issue under Executive Order No. 12287, and would enable the Court to enjoin the DOE from issuing the January entitlements notice as to *all* refiners.

In conclusion plaintiff has demonstrated a likelihood of success on the merits and the possibility that it will suffer irreparable harm as a result of the DOE's issuance of the January entitlements notice. Therefore, the defendants are hereby enjoined from issuing any further entitlements notices and from requiring Mobil to comply with such notices. In addition, defendants' motion to dismiss plaintiff's complaint is denied.

Dated: June 3, 1981
Syracuse, New York

/s/ HOWARD G. MUNSON
Howard G. Munson
Chief U.S. District Judge

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Nos. 10-35, 7-12 and 2-33

TOSCO CORPORATION, *Petitioner,*

v.

THE HONORABLE LUTHER B. EUBANKS, HONORABLE WILLIAM E. STECKLER, and HONORABLE HOWARD G. MUNSON, etc., *Respondents.*

Before METZNER, MAXWELL and LACEY, JUDGES.

The time for filing responsive briefs shall be extended to June 15, 1981. Inasmuch as there will be no time for reply briefs, these matters can be taken up at the hearing.

The Department of Energy may file a responsive brief in this action to the extent that it is not repetitive of its brief filed in No. 2-35 — *Mobil Oil Corporation* v. *DOE, et al.*

The Tosco Corporation may file a Supplemental Memorandum to Judge Munson's opinion.

No briefs shall be over thirty-five pages in length.

FOR THE COURT:

/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

June 1, 1981

APPENDIX D

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 2-33

TOSCO CORPORATION, *Petitioner,*

v.

The Honorable HOWARD G. MUNSON, Judge of the U.S. District Court for the Northern District of New York, *Respondent.*

Before: HONORABLE CHARLES M. METZNER, HONORABLE ROBERT EARL MAXWELL, and HONORABLE FREDERICK B. LACEY, JUDGES.

The Application for Writ of Mandamus is dismissed on motion of Mobil Oil Corporation.

This court has granted an application pursuant to 28 U.S.C. Sec. 1292(b) to review the Order granting a preliminary injunction [TECA No. 2-35]. The issues raised on the application of mandamus will be considered on the direct appeal from the Order of Judge Munson. The remedy of mandamus is not available in the circumstances. *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); *Kerr* v. *U.S. District Court*, 426 U.S. 394 (1975).

TOSCO has already been given leave to file a brief as an intervenor on the direct appeal from the Order.

SO ORDERED.

FOR THE COURT:

/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

June 9, 1981

APPENDIX E

Emergency Petroleum Allocation Act of 1973

P.L. 93-159, November 27, 1973, as amended by P.L. 93-511, P.L. 94-99, P.L. 94-133, P.L. 94-163, P.L. 94-385.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this may be cited as the "Emergency Petroleum Allocation Act of 1973."

Sec. 2.(a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimiz-

ing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

* * *

Sec. 4. (a) Not later than fifteen days after the date of enactment of this Act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d), such regulation shall take effect not later than fifteen days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b)(1) The regulation under subsection (a), to the maximum extent practicable, shall provide for—

(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, dis-

tribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

* * *

APPENDIX F

Subpart C—Crude Oil and Refinery Yield Control, 10 C.F.R. (1981)

§ 211.61 Scope.

(a) This subpart is applicable to all producers, refiners and others who purchase or obtain crude oil for resale, transfer or use.

(b) This subpart provides for the mandatory allocation of crude oil produced in or imported into the United States other than the first sale of crude oil exempted pursuant to the provisions of § 210.32 of this chapter.

(c) This subpart also provides a program for refinery and yield control.

§ 211.62 Definitions.

For purposes of this subpart—

"Adjusted crude oil receipts" means the crude oil receipts of a refiner in a particular month the composition of which has been adjusted to reflect any invoice which is received in that month for domestic crude oil (including crude oil sold under § 211.65) delivered to that refiner in any previous month (excluding, however, months prior to November 1974), and which has the effect of increasing or decreasing the volume of old or upper tier crude oil reported by that refiner under § 211.66(h) for such previous month, in cases where such previously reported volume was based on either a prior invoice or a good faith estimate (based on that refiner's past experience as to the old and upper tier crude oil content of domestic crude oil of the same origin) as to the old and upper tier crude oil content of that crude oil delivery.

"Alaska North Slope (ANS) crude oil" means crude oil transported through the trans-Alaska pipeline.

"Allocation period" means a consecutive six-month calendar period commencing either on April 1 or October 1 of each

year. The first allocation period shall be the six-month period from October 1, 1977 through March 31, 1978.

"California lower tier crude oil" means crude oil produced in California (or produced from federal lands off the shore of California) that is subject to the lower tier ceiling price rule set forth in § 212.73 of Part 212 of this chapter.

"California upper tier crude oil" means crude oil produced in California (or produced from federal lands off the shore of California) that is subject to the upper tier ceiling price rule set forth in § 212.74 of Part 212 of this chapter.

"Crude oil receipts" means, as to a particular refiner, the volume of crude oil (i) booked into its refineries in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, for its own account or for the account of a firm other than a refiner or (ii) if not previously so booked into its refineries, delivered by that refiner for its account to another refiner pursuant to a processing agreement with that other refiner. Crude oil receipts shall not include crude oil received by a refiner for the purpose of processing at its refineries for the account of another refiner. A particular crude oil receipt shall be deemed to have occurred when the related cost is booked into refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned, whether or not such crude oil has been actually received by that refiner, except that crude oil delivered by one refiner to another refiner pursuant to a processing agreement will be deemed to have been delivered by the delivering refiner to the other refiner when the risk of loss passes to the other refiner under the particular processing agreement or when the crude oil is received at the refinery of the other refiner, whichever occurs first. Crude oil which has been added by a refiner to its inventory and which is thereafter sold or otherwise disposed of without processing for the account of that refiner shall be deducted from its crude oil receipts at the time when the related cost is deducted from

refinery inventory in accordance with accounting procedures generally accepted and consistently and historically applied by the refiner concerned. The volume of domestic crude oil included in a refiner's crude oil receipts shall be evidenced by and consistent with invoices received with respect to such crude oil receipts.

"Crude oil runs to stills," means, in the case of a refiner other than a petrochemical producer, the total number of barrels of crude oil input to distillation units processed by a refiner and measured in accordance with Bureau of Mines Form 6-1300-M and, in the case of a petrochemical producer, the total number of barrels of crude oil input to processing units for conversion into petrochemicals.

"ERA" means the Economic Regulatory Administration of the Department of Energy established by Public Law 95-91 (August 4, 1977).

"Eligible firm" means any firm that imports an eligible product into the Bureau of Mines East Coast Petroleum Refining District or the State of Michigan for sale or use in those market areas, that is the importer of record under a license issued pursuant to Part 213 of this chapter and that owns the eligible product at the time of importation thereof pursuant to that license. Importation for the purpose hereof shall be as defined in paragraph (j) of § 213.27 of Part 213 of this chapter.

"Eligible market" means the geographical area coextensive with the Bureau of Mines East Coast Petroleum Refining District and the State of Michigan.

"Eligible product" means residual fuel oil imported into the eligible market in the period July 1, 1979 through September 30, 1981, except that an import of residual fuel oil into the United States customs territory which has been processed in the U.S. Virgin Islands shall not be considered an eligible product; *And provided*, that, Canadian residual fuel oil imported into the State of Michigan will qualify as an eligible product.

"Entitlement" means, for a particular month, the right of the refiner owning the entitlement to include one barrel of deemed old oil (as provided in § 211.67(b)), in its adjusted crude oil receipts in that month. The issuance and transfer of entitlements shall be evidenced on records maintained by the FEA.

"Independent refiner" means a refiner which (a) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to November 27, 1973, more than 70 percent of its refinery input of domestic crude oil (or 70 percent of its refinery input of domestic and imported crude oil) from producers which do not control, are not controlled by, and are not under common control with, such refiner, and (b) marketed or distributed in such quarter and continues to market and distribute a substantial volume of gasoline refined by it through independent marketers.

"Naphthas" mean petroleum fractions made up predominantly of hydrocarbons whose boiling points fall within the temperature range of 85° to 430°F. This definition does not incude specific hydrocarbon constituents such as hexane or special naphthas (solvents) as defined in § 211.182.

"National domestic crude oil supply ratio" means, for a particular month, the volume of deemed old oil (as defined in § 211.67(b)) included in the aggregate adjusted crude oil receipts of all refiners, decreased by a number of barrels of deemed old oil equal to the number of entitlements issuable to small refiners under § 212.67(e), the number of entitlements issuable pursuant to orders under subpart D of part 205, and the number of entitlements issuable under § 211.67(a)(4), § 211.67(a)(6), and § 211.67(a)(7), divided by the sum of the total volume of the crude oil runs to stills for all refiners for that month, the number of barrels considered as crude oil under § 211.67(a)(5) for that month, and fifty percent (50%) of the total volume of imports of eligible products by eligible firms for that month. The calculation of the national domestic crude oil supply ratio for each month shall

take into account entitlement purchase or sale requirements resulting from the correction of reporting errors pursuant to paragraph (j) of § 211.67.

"Naval Petroleum Reserves (NPR)" means Naval Petroleum Reserve Number 1 (Elk Hills), located in Kern County, California, established by Executive Order of the President, dated September 2, 1912; Naval Petroleum Reserve Number 2 (Buena Vista), located in Kern County, California, established by Executive Order of the President, dated December 13, 1912; Naval Petroleum Reserve Number 3 (Teapot Dome), located in Natrona County, Wyoming, established by Executive Order of the President, dated April 30, 1915.

"No. 2 heating oil" means heating oil grade No. 2 as defined in American Society for Testing and Materials (ASTM) D396-71.

"No. 2-D diesel fuel" means diesel fuel grade No. 2 as defined in American Society for Testing and Materials (ASTM) D975-71.

"NPR crude oil" means crude oil produced from the Naval Petroleum Reserves.

"Old oil" means old crude oil as defined in §§ 212.72 and 212.75 of this chapter, except that old oil included in a refiner's adjusted crude oil receipts shall not include condensate recovered at the inlet side of a gas processing plant.

"Petrochemical producer" means a person who manufactures petrochemicals in a petrochemical plant by processing petrochemical feedstock.

"Petroleum substitute" means, when certified in accordance with the provisions of § 211.67(a)(5) of this Part, any of the following: (a)(1) a liquid produced from domestic oil shale; (2) ethyl alcohol derived from domestic biomass when mixed with gasoline; (3) domestically found municipal solid waste or a solid derivative thereof; or (4) methane derived from domestic municipal sewage or landfills; or (b), as desig-

nated in orders issued by ERA following review of applications submitted under Subpart G of Part 205 of this Chapter, (1) any other fuel derived from domestically found solid-waste materials; or (2) any other fuel in a liquid form which is derived from domestic biomass, coal, or tar sands. Designation as a petroleum substitute may be denied with respect to any fuel eligible for review under section (b)(1) or (b)(2) of this definition, if ERA determines that the fuel in question does not result in a net gain of energy, considering the fuel consumption involved in its production, or requires the consumption of substantial quantities of a relatively scarce fuel for its production.

"Plant condensate" means a natural gas plant product, mostly pentanes and heavier hydrocarbons, recovered and separated as a liquid at gas inlet separators or scrubbers in processing plants or field facilities and which is not suitable for blending with natural gasoline or refinery gasoline.

"Processing agreement" means any agreement pursuant to which an owner of crude oil agrees to have that crude oil processed or refined by another person and retains ownership in some or all of the petroleum products so processed or refined from the crude oil.

"Refiner" means a firm which owns, operates or controls the operations of one or more refineries.

"Refiner-buyer" means any small refiner which is determined to be eligible for an allocation of crude oil pursuant to § 211.65 of this subpart.

"Refiner-seller" means a refiner which is not a small refiner or independent refiner as defined in this section; *provided, that* a refiner which is not a small refiner or an independent refiner, and all of the refining capacity of which has been constructed after January 1, 1974, shall not be classified as a refiner-seller; and *provided further, that,* for the allocation period commencing October 1, 1977, the refiners considered to be refiner-sellers for purposes of § 211.65 of this subpart

shall include only those firms classified as refiner-sellers in the allocation quarter commencing June 1, 1977. Refiner-seller shall also mean the United States Government when SPR crude oil is allocated pursuant to § 211.65 of this subpart; *except that*, unless expressly provided, the provisions of § 211.65(e)-(j) shall not apply to the United States Government.

"Refinery" means an industrial plant, regardless of capacity, processing crude oil feedstock and manufacturing refined petroleum products, residual fuel oil or petrochemicals, and shall include a petrochemical plant.

"Refining capacity" means, for each refinery, the capacity thereof as certified by the FEA. Any capacity of a refinery which has ceased to be operated continuously in the normal course of business shall be deducted from refining capacity.

"Small refiner" means a refiner, the sum of the capacity of the refineries of which (including the capacity of any person who controls, or is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

"Strategic Petroleum Reserve (SPR)" means the program for the storage of crude oil and/or petroleum products authorized by Title I, Part B of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. section 6231 *et seq.*

"SPR crude oil" means crude oil stored in or acquired for storage in the SPR, or for the distribution thereof. For the purposes of this subpart, such crude oil shall be considered as imported crude oil.

"Upper tier crude oil" means, (i) for the period February 1 through August 31, 1976, new crude oil as defined in §§ 212.72 and 212.75 of this chapter and crude oil produced and sold from a stripper well lease as defined in § 212.74 of this chapter, and (ii) effective September 1, 1976, new crude oil as defined in §§ 212.72 and 212.75 of this chapter, except that upper tier crude oil included in a refiner's adjusted crude oil receipts shall not include condensate recovered at the inlet side of a gas processing plant.

* * *

Sec. 211.66 Reporting Requirements.

(a) All matters pertaining to the allocation of crude oil and the refinery yield control program shall be addressed to the FEA in accordance with § 205.12, unless otherwise provided.

(b) A monthly report shall be required from refiners on forms and instructions issued by the FEO as to crude oil runs and products produced.

(c) *Reserved.*

(d) *Refiner-buyers' semiannual report.* Not later than the tenth (10th) day of the fifth (5th) month of each allocation period (February 10, 1978 for the allocation period commencing October 1, 1977) each refiner-buyer shall file with the FEA a report containing the following information as to the six-month period ending with the last full month prior to which the report is filed:

(i) The volume of the crude oil runs to stills for each of its eligible refineries, by month, identifying the volumes of domestic, imported and allocated crude oils so processed.

(ii) The volume by month of crude oil processed for the account of other refiners in each such refinery, identifying such refiners and the volume processed.

(iii) The volume by month of crude oil processed for the account of non-refiners in each such refinery, identifying such non-refiners and the volume processed.

(iv) The volume of crude oil by month processed for the account of that refinery-buyer by other refiners, identifying such other refiners and the volume processed.

(v) Any change in refinery capacity since the previous report.

(vi) Purchases of allocated crude oil for each eligible refinery, separately stating the volumes of SPR crude oil purchased from the Government.

(vii) Deliveries of allocated crude oil made by refiner-sellers to each eligible refinery.

(e) *Refiner-sellers' monthly report.* Not later than the tenth (10th) day of each month, each refiner-seller shall file with the FEA a report containing the following information with respect to any crude oil delivered to a refiner-buyer under § 211.65 in the month prior to the filing of the report:

(i) The volume of crude oil delivered under § 211.65.

(ii) The name of the refiner-buyer for which and the refinery to which the crude oil was delivered.

(iii) The type of crude oil delivered by name, API gravity, and sulfur content.

(iv) The allocation period for which the crude oil was sold.

(f) *Reserved.*

(g) Any refiner whose refinery capacity exceeds 175,000 barrels per day and who does not report as provided in paragraph (f) of this section will be deemed a refiner-seller.

(h) *Monthly report.* On or prior to the fifth day of each month, commencing with the month of August 1978, each refiner shall file with the ERA a report certifying the following information as to the second month prior to the month in which the report is filed:

(1) The estimated volume (to the best of the knowledge of the certifying officer) of old oil included in the crude oil receipts of that refiner.

(2) The estimated volumes (to the best of the knowledge of the certifying officer) of (i) ANS upper tier crude oil and (ii) upper tier crude oil, respectively, included in the crude oil receipts of that refiner.

(3) Any permitted or required adjustments to the estimated volumes of old and upper tier crude oil included in the crude oil receipts of that refiner.

(4) The volume of crude oil runs to stills of that refiner, taking into account, and specifying the amount of, the adjustments provided for in § 211.67(d).

(5) The weighted average costs for that refiner (including transportation costs to the refinery) of old oil, upper tier crude oil, ANS crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), SPR crude oil purchased from the Government, other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter, and imported crude oil included in that refiner's crude oil receipts. For refiners required to file transfer pricing report forms under § 212.84 of this chapter, the weighted average cost of imported crude oil reported under this subparagraph should be derived from the landed costs set forth in such reports.

(6) The estimated volume (to the best of the knowledge of the certifying officer) of California lower tier crude oil included in the crude oil receipts of that refiner, and the weighted average gravity (calculated as a single figure for the entire month) of such California lower tier crude oil included in such crude oil receipts.

(7) The estimated volume (to the best of the knowledge of the certifying officer) of California upper tier crude oil included in the crude oil receipts of that refiner, and the weighted average gravity (calculated as a single figure for the entire month) of such California upper tier crude oil included in such crude oil receipts.

(8) Such other information as the ERA may request.

(i) *Monthly transaction report.* On or prior to the tenth day of each month, commencing with the month of February, 1975, each refiner and eligible firm that was required to purchase or sell entitlements for the third month prior to the month in which the report is filed shall file with the FEA a re-

port certifying its purchases or sales of entitlements for that prior month.

(j) *Monthly report by eligible firms.* On or prior to the fifth day of each month, commencing with the month of April 1976, each eligible firm that has imported an eligible product in the second month preceding that month shall file with the ERA a report certifying the following:

(1) The identity, volumes and ports of origin and entry of any eligible products imported by the eligible firm in that preceding month.

(2) That the eligible product was imported for sale or use in the eligible market.

(3) Such other information as the ERA may request.

§ 211.67 Allocation of Domestic Crude Oil.

(a) *Issuance of entitlements.* (1) For each month, commencing with the month of June 1978, each refiner shall be issued a number of entitlements by the ERA equal to the number of barrels of crude oil included in the total volume of that refiner's crude oil runs to stills for that month multiplied by the national domestic crude oil supply ratio for that month, subject to the entitlement adjustment for small refiners set forth in paragraph (e) of this section and the entitlement adjustments in subparagraph (a)(4) of this section.

(2) Refiners to which entitlements shall be issued under this section shall include all refiners classified as refiner-buyers or refiner-sellers as of December 1, 1974 for purposes of § 211.65. Any refiner that is not so classified, or the refinery capacity of which is not certified by the FEA for purposes of § 211.65, shall apply to the FEA for certification of its refinery capacity for purposes of qualifying to receive entitlements under this section. With respect to the granting of any such application for certification, the FEA shall consider the factors set forth in § 211.65(b)(v) and (vi).

(3) For each month in the period July 1, 1979 through September 30, 1981, each eligible firm that has imported an eligible product in that month shall be issued a number of entitlements equivalent to fifty percent (50%) of the number of entitlements that would be received by a refiner (without giving effect to the provisions of § 211.67(e)) in that month with respect to inclusion of a number of barrels of crude oil in that refiner's crude oil runs to stills equal to a number of barrels of that eligible product imported by that eligible firm. An eligible product is imported for purposes of this paragraph (a)(3) in the month, as specified on Customs Forms 7501 and 7505, as appropriate, in which importation takes place.

(4) For each month, commencing with the month of June 1978, the number of entitlements issued under paragraph (a)(1) of this section to each refiner shall be increased by: (i) the number of barrels of California lower tier crude oil included in its adjusted crude oil receipts in that month multiplied by a fraction, the numerator of which is $2.38 plus or minus $.09 for each degree API gravity (or fraction thereof) by which the weighted average gravity of all California lower tier crude oil included in that refiner's adjusted crude oil receipts in that month either falls below or exceeds, respectively, 18 degrees API, and the denominator of which is the entitlement price for that month; and (ii) the number of barrels of California upper tier crude oil included in its adjusted crude oil receipts in that month multiplied by a fraction, the numerator of which is $1.45 plus or minus $.09 for each degree API gravity (or fraction thereof) by which the weighted average gravity of all California upper tier crude oil included in that refiner's adjusted crude oil receipts in that month either falls below or exceeds, respectively, 18 degrees API, and the denominator of which is the entitlement price for that month; *provided that* the dollar value of additional entitlements issued under this subparagraph (4) shall not exceed the dollar value of the obligation (as calculated under paragraph (b) of this section) for the crude oil with respect to which such additional entitlements are issued. The refiner

shall calculate and report the weighted average gravity of California lower tier crude oil and California upper tier crude oil separately, and in calculating such weighted average gravities shall (A) determine the gravity of such crude oil for each receipt of such crude oil in that month on the basis of the gravity of such crude oil at the time it becomes a receipt, and (B) determine a single monthly weighted average gravity for such crude oil by weight averaging (on a volumetric basis) all of such individual receipts in that month.

(5)(i) For each month, commencing with the month of June 1979, entitlements shall be issued with respect to a petroleum substitute as follows:

(A) In the case of a shale oil used as a feedstock or fuel in a domestic refinery, the refiner shall be issued, upon certification to ERA that the shale oil has been used as a feedstock or fuel in a domestic refinery, that number of entitlements that would be received by the refiner if each barrel of the shale oil were a barrel of crude oil;

(B) In the case of a shale oil used or sold for use domestically as fuel other than in a refinery, the producer of the shale oil shall be issued, upon certification to ERA that the shale oil has been used or sold for use domestically as fuel other than in a refinery, that number of entitlements that would be received by a refiner if each barrel of the shale oil were a barrel of crude oil.

(C) In the case of ethyl alcohol derived from domestic biomass and mixed with gasoline, the producer of the ethyl alcohol shall be issued that number of entitlements that would be received by a refiner if a barrel of ethyl alcohol were equal to 0.6189 barrels of crude oil; *provided, that,* entitlements will be issuable to a producer of ethyl alcohol only upon written certification by the producer to ERA that (1) the producer has actually mixed the ethyl alcohol with gasoline and used the resulting mixture domestically as fuel or sold the mixture for domestic use as fuel; or (2), in any case where the producer sells the ethyl alcohol prior to mixing with gasoline, the pro-

ducer has received written certification from a subsequent purchaser that such person (i) has been the first person to actually mix the ethyl alcohol with gasoline; (ii) has used the resulting mixture domestically as fuel or sold the mixture for domestic use as fuel; (iii) has based certification as to such use or sale upon documentation; and (iv) will maintain such documentation in a manner so as to be available for inspection at any time by the ERA within five years.

(D) In the case of municipal solid waste, the person who first processes the municipal solid waste to produce a solid fuel shall be issued that number of entitlements that would be received by a refiner if each ton of municipal solid waste processed were equal to 1.40 barrels of crude oil; *provided, that,* entitlements will be issuable to the processor of the municipal solid waste only upon written certification by the processor to ERA that the processor has (1) actually used the solid waste or solid derivative thereof domestically to produce useful energy and that the energy thus produced has actually been used as fuel; or (2) sold the solid waste or solid derivative thereof or useful energy produced from either the solid waste or its derivative for domestic use as fuel.

(E) In the case of methane derived from municipal sewage or domestic landfills, the collector of the methane shall be issued, upon certification to ERA that the methane has been used or sold for use domestically as fuel, that number of entitlements that would be received by a refiner if each unit of methane having a gross heating value of 5.7 million BTU's were a barrel of crude oil.

(F) In the case of solid waste or a solid or gaseous derivative thereof which has been designated as a petroleum substitute by ERA in an order issued pursuant to § 205.95 of Part 205 of this Chapter, that person designated by ERA as eligible to participate in the entitlements program with respect to such petroleum substitute shall be issued that number of entitlements that would be received by a refiner if the unit of measurement established by ERA for that petroleum substitute were a barrel of crude oil.

(G) In the case of a liquid petroleum substitute which has been designated as a petroleum substitute by ERA in an order issued pursuant to § 205.95 of Part 205 of this Chapter and which has a gross heating value of 5.7 million or more BTU's per barrel, that person designated by ERA as eligible to participate in the entitlements program with respect to the petroleum substitute shall be issued that number of entitlements that would be received by a refiner if a barrel of the petroleum substitute were a barrel of crude oil.

(H) In the case of a liquid petroleum substitute which has been designated as a petroleum substitute by ERA in an order issued pursuant to § 205.95 of Part 205 of this Chapter and which has a gross heating value of less than 5.7 million BTU's per barrel, that person designated by ERA as eligible to participate in the entitlements program with respect to the petroleum substitute shall be issued that number of entitlements that would be received by a refiner if a barrel of the petroleum substitute were equal to a fraction of a barrel of crude oil, the numerator of which would be the gross heating value in BTU's per barrel of the petroleum substitute, and the denominator of which would be 5.7 million BTU's. An order issued by ERA to designate a petroleum substitute shall also designate the firm to which entitlements will be issued and the manner in which the use of the petroleum substitute by that firm shall result in entitlement issuances.

(ii) Each firm shall in its initial report to ERA for purposes of receiving entitlements pursuant to the provisions of subparagraph (a)(5)(i) of this section submit written certification that all local, state, or federal permits or licenses required with respect to the production, distribution or any other use of the petroleum substitute have been obtained and provide copies of such permits and licenses and, as required by ERA, any information submitted to a governmental body for the purpose of obtaining any applicable permit or license. Each such firm shall in its initial report and each month thereafter submit any information required by ERA to be submitted by such firm on forms adopted by ERA for purposes of determining

the entitlements issuable to such firm. A firm shall provide written certification in any submission that the information set forth therein is accurate and based upon documentation, and, further, that such firm will maintain such records in a manner so as to be available for inspection at any time by the ERA within five years. Records required to be kept under this subparagraph shall be made available for inspection at any time upon the request of a representative of ERA.

(6)(i) For each month in the period May 1, 1979 through October 31, 1979, each firm that imports "distillate fuel oil, less No. 4" and "kerosene" as those terms are defined in the instructions to ERA Form ERA-60, that is the importer of record under a license issued pursuant to Part 213 of this chapter, and that owns the product at the time of importation thereof pursuant to that license shall be issued a number of entitlements equal to the number of barrels of distillate fuel oil, less No. 4, and kerosene imported in that month by that firm multiplied by a fraction, the numerator of which is $5, and the denominator of which is the entitlement price for that month.

(ii) For purposes of Paragraph (a)(6), the time of importation shall be the earliest of the following dates as specified on the Customs Form 7501 or 7505: (A) the "release date"; (B) the "entry date"; (C) the "validation date"; (D) the "'PAID' stamp date"; (E) the "date of importation"; or (F) the "withdrawal date."

(7)(i) For each month commencing with the month of August 1980, the United States Government shall be issued entitlements for crude oil purchased for, delivered to, and accepted for delivery to the Strategic Petroleum Reserve in the following month. The number of entitlements issued shall be calculated in accordance with the provisions of subparagraphs (iii) through (vi) of this paragraph (a)(7).

(ii) In any case where the United States Government acquires from a refiner or other firm crude oil for storage in the Strategic Petroleum Reserve pursuant to an exchange or

matching purchase and sale transaction, no domestic crude oil shall be deemed to have been transferred by that refiner or other firm in that exchange or transaction and such volume of domestic crude oil deemed to have been retained shall be included in a refiner's crude oil receipts in the month in which such domestic crude oil is delivered to and accepted for delivery to the Strategic Petroleum Reserve, and the United States Government shall be issued entitlements for the month prior to the month in which such domestic crude oil is delivered to and accepted for delivery to the Strategic Petroleum Reserve. The number of entitlements issued shall be calculated in accordance with the provisions of subparagraphs (iii) through (vi) of this paragraph (a)(7) on the basis of the volume of crude oil given up by the Government in any such exchange or transaction.

Notwithstanding anything to the contrary to 10 CFR Part 212, in any matching purchase and sale transaction subject to this subparagraph, the United States Government may pay and the seller may receive any price for the crude oil purchased by the United States Government for the Strategic Petroleum Reserve.

(iii) One entitlement shall be issued for each barrel of imported crude oil and each barrel of domestic crude oil the first sale of which is not subject to the ceiling price limitations of Subpart C of Part 212 of this chapter.

(iv) A fraction of an entitlement shall be issued for each barrel of upper tier crude oil other than ANS upper tier crude oil, the numerator of which is the difference between the reported weighted average cost per barrel to refiners of upper tier crude oil other than ANS upper tier crude and the reported weighted average cost per barrel to refiners of lower tier crude oil, and the denominator of which is the entitlement price.

(v) A fraction of an entitlement shall be issued for each barrel of ANS upper tier crude oil, the numerator of which is the difference between the reported weighted average cost per

barrel to refiners of lower tier crude oil, and the demoninator of which is the entitlement price.

(vi) The calculations in paragraphs (a)(7)(iv) and (a)(7)(v) of this section shall be based on the entitlement price fixed for, and the weighted average costs reported for, the month prior to the month in which the crude oil is delivered to the Strategic Petroleum Reserve.

(b) *Required purchase of entitlements by refiners.* (1) For each month, commencing with the month of February 1976, each refiner that has been issued fewer entitlements for that month than the number of barrels of deemed old oil (as calculated under paragraph (b)(2) of this section) included in its adjusted crude oil receipts shall purchase a number of entitlements effective for that month equal to the difference between the number of barrels of deemed old oil (as so calculated) included in that refiner's adjusted crude oil receipts for that month and the number of entitlements issued to and retained by that refiner. Entitlement purchases required under this paragraph (b) with respect to a particular month shall be effected by the close of the second month following that month.

(2) To calculate the number of barrels of deemed old oil included in a refiner's adjusted crude oil receipts for purposes of the definition of national domestic crude oil supply ration in § 211.62 of this subpart, paragraph (b)(1) of this section, and paragraph (c) of this section shall be calculated as follows: (i) Each barrel of old oil shall be equal to one barrel of deemed old oil; (ii) Each barrel of upper tier crude oil (except ANS upper tier crude oil) shall constitute that fraction of a barrel of deemed old oil, the numerator of which is equal to the reported weighted average cost per barrel to refiners of imported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), heavy crude oil (as determined pursuant to § 212.59), newly discovered crude oil (as

determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter for that month, less such weighted average cost per barrel to refiners of upper tier crude oil (except ANS upper tier crude oil), and the denominator of which is the entitlement price for that month; (iii) Each barrel of ANS upper tier crude oil shall constitute that fraction of a barrel of deemed old oil the numerator of which is equal to the reported weighted average cost per barrel to refiners of imported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), heavy crude oil (as determined pursuant to § 212.59), newly discovered crude oil (as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter for that month, less such weighted average cost per barrel to refiners of ANS upper tier crude oil, and the denominator of which is the entitlement price for that month.

(c) *Required sale of excess entitlements.* For each month, commencing with the month of February 1976, each refiner that has been issued a greater number of entitlements for that month than the number of barrels of deemed old oil (as calculated under paragraph (b)(2) of this section) included in its adjusted crude oil receipts shall sell such excess entitlements, and the United States Government and any eligible firm (other than a refiner) that has been issued entitlements shall sell such entitlements.

(d) *Adjustments to volume of crude oil runs to stills.* (1) A refiner's volume of crude oil runs to stills shall (i) include (A) the volume of crude oil processed by another refiner for that refiner pursuant to a processing agreement and (B) the volume of crude oil processed by that refiner for a person other than a refiner pursuant to a processing agreement, and (ii) ex-

clude the volume of crude oil processed by that refiner for another refiner pursuant to a processing agreement.

(2) The volume of a refiner's crude oil runs to stills in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall be reduced by that refiner's volume of export sales under § 212.53 of Part 212 of this chapter in that month of refined petroleum products (including aviation fuels as defined in § 211.142 of this part, but excluding refined lubricating oils) and residual fuel oil, including sales to a domestic purchaser which certifies the product is for export; *provided*, however, that the volume of a refiner's crude oil runs to stills for a month shall not be reduced by that refiner's volume of export sales of Bunker C and Navy Special fuel oils and No. 4 diesel, which are sold for use as a marine fuel on a voyage departing from a United States port.

(3) The volume of refiner's crude oil runs to stills in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall include the total number of barrels of plant condensate and the total number of barrels of synthetic crude oil made from tar sands which are imported from Canada and are utilized in that month as inputs to distillation units by a refiner, measured in accordance with the Bureau of Mines Form 6-1300-M. Neither plant condensate nor synthetic crude oil made from tar sands which are imported from Canada shall be eligible for inclusion in the volume of a refiner's crude oil runs to stills under this paragraph (3) unless payment has been made in accordance with Presidential Proclamation No. 3279, as amended, of any import license fees applicable to crude oil as defined for purposes of this section, which is imported for refining.

(4) For the period July 1, 1979 through September 30, 1981, for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio (but not for purposes of paragraph (e) of

this section), the volume of crude oil runs to stills of any domestic refiner atrributable to productions of residual fuel oil transported in foreign flag tankers for sale (whether directly for consumption or for resale) or use in the eligible market (as defined in § 211.62) shall be reduced by fifty percent (50%). Any export sales of residual fuel oil giving rise to a deduction under paragraph (d)(2) above shall not be considered as residual fuel oil production for puirposes of this paragraph (d)(4).

(5)(i) The volume of a refiner's crude oil runs to stills beginning with the month of January, 1981 in a particular month for purposes of the calculations in subparagraph (1) of paragraph (a) of this section and the calculations for the national domestic crude oil supply ratio shall include the number of barrels of naphthas which are imported into Puerto Rico (other than imports from the U.S. Virgin Islands and other than naphthas imported into Puerto Rico which are acquired pursuant to an exchange or similar matching purchase and sale transaction for naphthas produced by a refinery located in the United States) and are utilized in that month as a petrochemical feedstock at a petrochemical plant owned or operated by that refiner in Puerto Rico, as reduced in subdivision (ii) of this subparagraph. The number of eligible barrels of naphthas for a particular month further shall be multiplied by a fraction the numerator of which is equal to the weighted average per barrel cost of all naphthas imported into Puerto Rico for that month as to which entitlement issuances are sought less the imputed per barrel cost of domestically produced naphthas for that month, and the denominator of which is the entitlement value for a barrel of crude oil included in the volume of a refiner's crude oil runs to stills for that month. For purposes of this subdivision (5)(i), the imputed per barrel cost of domestically produced naphthas for a particular month, commencing with January, 1981 shall be equal to 117 percent of the weighted average per barrel cost of all the crude oil receipts for all domestic refiners for that month.

(ii) The volume of naphthas eligible for inclusion in the volume of a refiner's crude oil runs to stills in a particular month under subdivision (i) of this subparagraph shall be reduced by the volume of export sales (under § 212.53 of Part 212 of this chapter, including sales to a purchaser which certifies it or an entity affiliated with that purchaser will export the product so purchased), for that month of products produced at the petrochemical plant that has processed the imported naphthas.

(iii) Notwithstanding any other provisions of this section, a firm other than a refiner that owns a petrochemical plant in Puerto Rico shall be eligible to receive entitlements with respect to naphthas processed at such a plant on the same basis as is provided for refiners in subdivisions (i) through (ii) of this subparagraph, except that such a firm shall not be eligible for any additional entitlements under the provisions of paragraph (e) of this section. Any such firm shall file reports under § 211.66 on the same basis as a refiner.

(iv) Any firm that is eligible for entitlement issuances under this subparagraph shall obtain appropriate certifications from any other firm to which it sells products produced at a petrochemical plant located in Puerto Rico. Such certification shall set forth whether or to what extent the products so purchased will be sold (whether directly by that other firm or indirectly through any firm affiliated with that other firm) in transactions that constitute export sales under § 212.53 of Part 212 of this chapter. Any firm purchasing products produced at a petrochemical plant located in Puerto Rico shall, upon the request of the owner or operator of that facility, certify to that owner or operator as to whether or what extent the further sale of those products by that firm (or any affiliate thereof) will constitute export sales under § 212.53.

(6) [Reserved]

(7) [Reserved]

(8) Commencing with the month of July 1978, the volume of a refiner's crude oil runs to stills in a particular month

for purposes of the calculations in subparagraph (1) of paragraph (a) of this section and the calculations for the national domestic crude oil supply ratio shall include the total number of barrels of the liquid produced from oil shale that is found in the United States and used as a refining feedstock, blending feedstock or fuel in a domestic refinery in that month by a refiner.

(9) Commencing with the month of January 1979, the volume of crude oil runs to stills of a refiner in a particular month as to any of its refineries located in the State of Alaska, for purposes of the calculations in subparagraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio, shall not include the number of barrels of unfinished oils or partially-refined petroleum products injected or reinjected by that refinery into the Trans-Alaska Pipeline System in that month.

(e) *Small refiner bias.* (1) In addition to the number of entitlements issuable under paragraph (a) of this section, subject to the limitations set forth in subparagraphs (2), (3) and (4) below, effective for refiners' volumes of crude oil runs to stills for June 1979, each small refiner shall be issued the following number of additional entitlements for each day of a particular month: (i) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 0 to 10,000 barrels in that month, each such refinery shall receive a number of entitlements equal to the number of barrels of such refinery's daily average volume of crude oil runs to stills for that month multiplied by a fraction, the numerator of which is $.96, and the denominator of which is the entitlement price for that month; (ii) for each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 10,000 to 30,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is $9,600 plus $.315 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 10,000 barrels for that month, and the denominator of which is the entitle-

ment price for that month; (iii) for each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 30,000 to 50,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is $15,900 minus $.095 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 30,000 barrels for that month, and the denominator of which is the entitlement price for that month; (iv) for each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 50,000 to 100,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is $14,000 minus $.10 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceed 50,000 barrels for that month, and the denominator of which is the entitlement price for that month; (v) for each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 100,000 to 175,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is $9,000 minus $.12 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 100,000 barrels for that month, and the denominator of which is the entitlement price for that month.

(2) Effective for refiners' volumes of crude oil runs to stills for June 1977, no entitlements shall be issuable under paragraph (e)(1) of this section with respect to any volume of a small refiner's crude oil runs to stills attributable to a processing agreement for the account of that small refiner with another refiner.

(3) Each small refiner shall separately identify in its reports filed pursuant to § 211.66(h) of this subpart any volumes of its crude oil runs to stills not eligible (under the provisions of paragraph (e)(2) of this section) for small refiner bias entitlements.

(4) For purposes of the calculations in subparagraph (e)(1) above, the daily average volume of a particular small

refinery's crude oil runs to stills shall be computed as follows: The daily average volume of a small refiner's crude oil runs to stills (with respect to all of its refineries) shall be multiplied by a fraction, the numerator of which is the capacity of that particular small refinery as certified pursuant to subparagraph (a)(2) of this section, and the denominator of which is the capacity of that small refiner (with respect to all of its refineries) as certified pursuant to subparagraph (a)(2) of this section.

(f) *Transactions under § 211.65.* (1) Effective for sales for the allocation quarter commencing March 1, 1976 under § 211.65 of this subpart, no sale by a refiner-seller under § 211.65 of shall be deemed for purposes of this section to include any volume of domestic crude oil. If a refiner-seller sells actual volumes of domestic crude oil under § 211.65, the related volumes of old oil and upper tier crude oil shall be included in that refiner-seller's crude oil receipts in the month in which the sale is made. For purposes of the adjustments set forth in paragraph (a)(4) of this section, a refiner-buyer's receipts of imported crude oil and Alaska North Slope crude oil shall include volumes of crude oil sold under § 211.65 to that refiner-buyer.

(2) For sales allocation quarters prior to the allocation quarter commencing March 1, 1976, each sale by a refiner-seller under § 211.65 shall be deemed to include volumes of old oil (and upper tier crude oil, if any) proportionate to the volumes thereof included in the deliveries of crude oil to that refiner-seller that determine the price at which the sale is made under § 212.94 of Part 212. Any volumes of domestic crude oil so deemed to be included in any sale under § 212.65 shall be reflected in the crude oil receipts of the refiner-buyer concerned. As to each sale for any such prior allocation quarter, each refiner-seller shall certify to the refiner-buyer the volume of old oil (and upper tier crude oil, if any) included in the volume of crude oil sold within twenty-eight (28) days following the month in which the crude oil is delivered to or for the account of the refiner-buyer in accordance with th provisions of § 212.131 of Part 212.

(3) In determining the weighted average landed cost of crude oil delivered to a refiner-seller in a month pursuant to § 212.94 of Part 212, the cost of any required purchases or revenues from any sales of entitlements by that refiner-seller shall not be taken into account.

(g) *Exchanges of crude oil.* (1) Subject to the provisions of paragraph (a)(3) below, in any exchange of crude oil in which only quality and location differentials are given effect in the calculation of the exchange ratio, or in any matching purchase and sale transaction which has the same effect as such an exchange, no volumes of domestic crude oil shall be deemed to have been transferred. Any volumes of domestic crude oil exchanged away or sold pursuant to any such exchange or matching purchase and sale transaction shall be considered as having been retained by the refiner or other firm that has so exchanged away or sold such volumes, regardless of the volume of crude oil received or purchased by that refiner or other firm in such exchange or transaction.

(2) Subject to the provisions of paragraph (g)(3) below, volumes of domestic crude oil deemed to be retained by a refiner under the provisions of paragraph (g)(1) above shall be (i) included in that refiner's crude oil receipts at the time the crude oil acquired pursuant to the related exchange or purchase and sale transaction constitutes a crude oil receipt under § 211.62 of this subpart to that refiner, or (ii) certified as old oil, upper tier crude oil, ANS crude oil, stripper well crude oil (as defined in Part 212 of this chapter), heavy crude oil, (as determined pursuant to § 212.59), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), newly discovered crude oil (as determined pursuant to § 212.78), newly discovered crude oil (as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), or any other domestic crude oil the first sale of which is exempt from Part 212 of this chapter, as the case may be, under the provisions of § 212.131 of Part 212 when the crude oil acquired pursuant to the related exchange or purchase and sale transactions is sold to another firm.

(3) Where a refiner exchanges away or sells volumes of domestic crude oil in an exchange or matching purchase and sale transaction of the type described in paragraph (g)(1) above and receives in exchange or purchases in the transaction foreign crude oil that is delivered and processed outside the United States, that refiner shall include any domestic crude oil so exchanged away or sold by it in its crude oil receipts as of the date that domestic crude oil is so exchanged away or sold.

(4) The provisions of paragraph (g)(1) above shall not apply to transactions involving domestic crude oil which is exchanged away by a firm other than a refiner for foreign crude oil that is not processed in a refinery located in the United States. Any firm other than a refiner that has exchanged away or sold domestic crude oil within the United States pursuant to an exchange transaction in which other crude oil is also transferred outside the United States shall comply with the certification requirements of § 212.131 of Part 212 as to any volumes of old oil or upper tier crude oil, as the case may be, so exchanged away or sold. Any domestic crude oil delivered to a refiner in the United States pursuant to a transaction of the type described in this paragraph (g)(4) shall be included in the crude oil receipts of the refiner that receives, directly or indirectly through further sales or exchanges, the volumes of domestic crude oil that are the subject of the transaction, as provided in § 211.62 of this subpart.

(5) For purposes of this paragraph (g), "refiner" means any firm that owns, operates or controls the operations of one or more refineries, and includes any entity that is a part of or affiliated with, or that controls or is controlled by (whether directly or indirectly), a refiner.

(h) *Averaging of crude oil receipts.* Upon application by a refiner in accordance with the procedures established under Subpart G of Part 205 of this chapter within thirty (30) days following the close of a month, the FEA may adjust the crude oil receipts of that refiner for that month to permit the portion

of such crude oil receipts specified by the FEA to be included in the crude oil receipts of that refiner for one or more subsequent months, if the volume of crude oil receipts in that month is significantly disproportionate to the volume of that refiner's crude oil runs to stills for that month due to a shutdown (by reason of either a mechanical failure or normal maintenance procedures) resulting in a fifty (50%) percent or greater portion of that refiner's refinery capacity not having been operable for the duration of that month.

(i) *Issuance and transfer of entitlements.* (1) The FEA shall issue entitlements for each month (effective for the month of February 1976 and subsequent months) pursuant to a notice issued on the fifteenth day of the second month following that month.

(2) Each notice published by the FEA evidencing the issuance of entitlements under this section shall specify as to a particular month the national domestic crude oil supply ratio, the name of each refiner and other eligible firm to which entitlements have been issued, the number of barrels of deemed old oil included in each refiner's adjusted crude oil receipts, the number of entitlements issued to each such refiner or other firm, the number of entitlements required to be purchased or sold by each such refiner or other firm, and the price at which entitlements shall be purchased and sold.

(3) No transfer of an entitlement shall be effective if made to any firm that is not purchasing such entitlement to fulfill such firm's obligations under this section.

(4) The price at which entitlements shall be sold and purchased shall be fixed by the ERA for each month and shall be the exact differential between the weighted average cost per barrel to refiners of old oil and such weighted average cost of imported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), heavy crude oil (as determined pursuant to § 212.59), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), newly discovered crude oil

(as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter, such costs to be equivalent to the delivered costs to the refinery.

(j) *Reporting errors.* (1) Refiners and eligible firms shall correct any errors contained in reports filed pursuant to § 211.66 by filing an amended report for the particular month. Based on any reporting errors so corrected, the FEA in its discretion may adjust entitlement issuances to the refiner or eligible firm in one or more months subsequent to the month in which the amended report is filed with the FEA, by issuing fewer entitlements that the number otherwise issuable, by requiring the refiner or eligible firm to purchase entitlements in order to correct for excess entitlements issued in a prior month or by issuing entitlements over and above the number otherwise issuable to compensate for too few entitlements having been issued in such prior month. All entitlement issuances or purchase requirements under this subparagraph shall give effect to any differential between the entitlement price for the month in which any correction is reflected as compared with the entitlement price for the month as to which the reporting error was made (except with respect to corrections to volumes of crude oil runs to stills where a corresponding adjustment to crude oil receipts was made as contemplated by the term "adjusted crude oil receipts" in § 211.62) and such other factors as the FEA deems appropriate.

(2) Notwithstanding the provisions of paragraph (j)(1) of this section, corrections of reporting errors for the months November 1974 through August 1975 shall be made as follows. FEA shall recalculate for those months the purchase and sale obligations (giving effect to any applicable relief under decisions and orders issued by FEA's Office of Exceptions and Appeals and to the provisions of Special Rule No. 3 for Subpart C) of all refiners and eligible firms based on inclusion in each month of each refiner's and eligible firm's corrected vol-

ume (as reported to the FEA) of crude oil runs to stills, volume of old oil included in its crude oil receipts (other than adjustments effected as contemplated by the term "adjusted crude oil receipts" in § 211.62) and eligible product imports. No entitlement price adjustment as contemplated by paragraph (j)(1) of this section shall be made in the calculations under this paragraph (j)(2). FEA shall then aggregate for each refiner and eligible firm its net purchase or sale amount (in dollars) for these months (giving effect to the published purchase and sale obligations for these months) and apply these amounts in substantially equal portions (translated into current entitlement values) to that refiner's or eligible firm's entitlement purchase or sale obligations for the months of July 1976 through February 1977.

(3) For purposes of this paragraph, errors required to be corrected by the filing of amended reports include (i) clerical errors, and (ii) inaccurate estimates as to the domestic crude oil pricing composition of a particular volume of crude oil where the refiner had no basis, in prior experience or otherwise, on which to make that estimate.

(k) *Failure to consummate transactions.* The FEA may direct refiners or eligible firms that have not purchased the required number of entitlements under this section for a particular month to purchase such required number of entitlements at a price specified by the FEA from any refiner or eligible firm that has entitlements for such month available for sale, The FEA may direct refiners or eligible firms that have entitlements available for sale to sell such entitlements at a price specified by the FEA to refiners or eligible firms that have not purchased their required number of entitlements under this section.

(l) *Certification by non-refiners.* Within twenty-eight (28) days following each month, commencing with the month of January 1978, each firm other than a refiner that has delivered crude oil to a refiner for processing for the account of such firm pursuant to a processing agreement in that month

shall certify to that refiner the respective volumes of and that firm's costs for old oil (separately identifying any California lower tier crude oil), ANS crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), other domestic crude oils the first sale of which is exempt from Part 212 of this chapter, and imported crude oil contained in the crude oil so delivered to that refiner.

(m) *Adjustments to crude oil and product costs.* (1) *Refiners.* (i) *Entitlements purchased.* (A) The cost of entitlements purchased in a particular month pursuant to this section by refiners, which shall be calculated exclusive of any reduction in such costs in a particular month because of entitlements issued for the importation of eligible products, and exclusive of the cost of entitlements purchased in a particular month pursuant to adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section, shall be added to the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased cost to be applied to product prices in the following month under the "A" factor of the general formulae of § 212.83(c)(2) of this chapter); provided, that, to the extent that the obligation of a refiner to purchase entitlements is reduced by volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement, and that the monetary value of that reduced purchase obligation is used to reduce the processing fee otherwise payable by that firm under the processing agreement, or is otherwise passed on to that firm under the processing agreement, or is otherwise passed on to that firm such monetary value may also be added by that refiner to its cost of crude oil purchased or landed in that month by the firm to which the monetary value of the reduced purchase obligation is passed on pursuant to this paragraph.

(B) The reduction in the cost of entitlements purchased in a particular month because of entitlements issued for the

importation of eligible products shall be subtracted from the total cost of the product concerned, purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to prices of that product under the "B;t" factor of the appropriate formula for that product of § 212.83(c) of this chapter.)

(C) The cost of entitlements purchased in a particular month pursuant to the adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section shall be a cost of crude oil purchased or landed in that month which shall not be applied to product prices pursuant to the "A" factor of the general formulae of § 212.83(c)(2) of this chapter, but which shall instead be applied only to prices for residual fuel oil sold in or into the East Coast market.

(ii) *Entitlements sold.* (A) The sales revenues from entitlements sold in a particular month pursuant to this section by refiners, which shall be calculated exclusive of any reduction in such sales revenues in a particular month pursuant to adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section, and exclusive of any sales revenues from the sale of entitlements issued for the importation of eligible products, shall be subtracted from the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to all product prices in the following month under the "A" factor of the general formulae of § 212.83(c)(2) of this chapter); provided, that, to the extent that the sales revenues from entitlements which are issued for volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement are used to reduce the processing fee otherwise payable by that firm under the processing agreement, or are otherwise passed on to that firm, such sales revenues shall not be subtracted by that refiner from its cost of crude oil purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the

entitlement sales revenues are passed on pursuant to this paragraph.

(B) The sales revenues from entitlements issued for the importation of eligible products which are sold in a particular month shall be subtracted from the total cost of the product concerned, purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to prices of that product under the "B;t" factor of the appropriate formula for that product of § 212.83(a)(2) of this chapter).

(C) The reduction in sales revenues from entitlements sold in a particular month pursuant to the adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section shall be a cost of crude oil purchased or landed in that month which shall not be applied to product prices pursuant to the "A" factor of the general formulae of § 212.83(a)(2) of this chapter, but shall instead be applied only to prices for residual fuel oil sold in or into the East Coast market.

(2) *Resellers and retailers.* The sales revenues from entitlements sold pursuant to this section by resellers or retailers shall be subtracted from the cost of the product in inventory for which the entitlements were issued, so as to reduce the weighted average unit cost of that product in inventory computed pursuant to § 212.92 of this chapter.

(3) *Sales of eligible products to eligible firms.* The total amount of any reductions in the cost of eligible products to the seller because of entitlements issued for the importation of such products, which are required by paragraphs (m)(1) and (m)(2) of this section, shall be applied exclusively to the determination of maximum lawful prices charged in sales in which the purchaser does not receive entitlements for the importation of an eligible product. Separate price calculations shall be made for sales of eligible products in which the purchaser receives entitlements for the importation of eligible products, which shall comply in all respects with the regulations of Subparts E or F of Part 212 of this chapter, except that

the amount of increased product cost used to compute such prices shall not be reduced because of entitlements issued for the importation of eligible products.

(4) *Timing.* The date of purchase or sale of entitlements for purposes of determining the date on which a cost or a cost reduction is incurred under § 212.83(c) or § 212.93 of this chapter shall be the date on which the transaction is reported to have taken place on the monthly transaction report filed with the FEA under paragraph (i) of § 211.66.

APPENDIX G

AKIN, GUMP, STRAUSS, HAUER & FELD

July 12, 1981

Ms. Ruth Jacobson
Clerk
Temporary Emergency Court
of Appeals
United States Courthouse
Room 2400
3rd & Constitution Avenue, N.W.
Washington, D.C. 20001

Re: *Mobil Oil Corp.* v. *DOE*, No. 2-35

Dear Ms. Jacobson:

This letter is intended to present Mobil's brief comments on Tosco's letter to this Court of July 10, 1981 regarding the Department of Energy's "clean-up" regulations relating to the entitlements program. In essence, Mobil submits that these clean-up regulations do not and cannot possibly provide Mobil with a real or adequate mechanism for obtaining relief. Contrary to Tosco's misleading assertion, therefore, these regulations do not justify the lifting of Judge Munson's preliminary injunction. Indeed, the issuance of the regulations serves only to underscore the propriety of and absolute need for the relief that Judge Munson entered in this case.

Before addressing the deficiencies of the DOE's clean-up regulations, however, Mobil wishes to emphasize that the comments set forth below are, of necessity, brief and less than exhaustive. Mobil respectfully requests that if this Court questions whether the clean-up regulations will actually provide Mobil with the relief to which it may be entitled, the parties should be permitted to address this complex matter fully — either in this Court or in the district court.[1]

[1] The issue of whether or not a party seeking preliminary injunctive relief has demonstrated irreparable injury sufficient to warrant such relief is, of course, one committed to the discretion of the district court.

1. The DOE admits in the Preamble to its clean-up regulations that the regulations are not in any way designed to deal with the root problems of the disappearance of price-controlled oil from the entitlements program. After claiming once more that it has purportedly been "investigating" this problem, the agency then declares that "any regulatory action in this regard would be beyond the scope of this rulemaking." Establishment of a Mechanism for Entitlements Adjustments for Periods Prior to Decontrol of Crude Oil, Dkt. No. ERA-4-81-01 at 7 ("Clean-up Preamble"). Thus, the agency is in effect conceding once and for all, especially in light of its Office of Hearings and Appeals' recent decision to turn its back on the problem as well, that it intends to abdicate its administrative responsibility to correct the serious flaws in the entitlements program — which both Judge Munson and the Office of Hearings and Appeals agreed that DOE had caused — and to transfer the burden of grappling with the problem to federal judiciary. Indeed, although it has claimed both before Judge Munson and in this Court that the agency was hard at work on the problem and the courts were not competent to remedy the problem, and, accordingly, should not interfere, the overall theme running throughout the DOE's Preamble is that the agency wants to wash its hands of the situation it has caused, leaving the judiciary to sort it out. *See, e.g.*, Clean-up Preamble at 27.

2. More importantly, although Tosco asserts in its July 10, 1981 letter to this Court that the DOE's clean-up regulations ensure that Mobil will be provided with relief in the event that it prevails in this litigation, Tosco letter at 2, the letter itself is noticeably silent about the actual content of these regulations. The reason for this silence is not surprising: the very terms of these regulations indicate that they are not intended to, and cannot in any fashion, accommodate a claim for relief arising from injury that was caused by the disappearance of price-controlled crude oil.[2]

[2] Tosco's reticence may also be explained by the fact that the DOE's clean-up regulations are hopelessly vague and indefinite. For

3. a. *The Clean-up List.* Under the regulations the clean-up list itself is to be issued on the basis of claims and adjustments that firms must submit to DOE by August 15, 1981. § 211.69(d)(1) and (2); Preamble at 13. DOE will issue the list "as soon as practicable" after that date. § 211.69(g)(1). Although DOE blandly claims (Preamble at 7) that this list provides "a mechanism" for relief, the fact remains that it is impossible even to conceive of obtaining an appropriate final judgment by that date, and certainly not a judgment that is no longer subject to appeal.[3]

b. *The Post-Clean-up List Mechanism.* The regulatory Preamble does not even claim that the new post-clean-up list mechanism is adequate for Mobil's purpose. Tosco claims that this mechanism is adequate, but Tosco does not even attempt to explain how that could be true. A brief description of the post-clean-up list mechanism will show that it cannot provide relief to Mobil and indeed that its legal validity is highly questionable.

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example, there is no provision in the clean-up regulations that explains how a firm with a judgment is to notify other firms that supposedly are liable for the judgment. *See* 10 C.F.R. § 211.69(h)(1). The DOE states in the Preamble that a "claiming" firm should provide "notice" to the firms, Clean-up Preamble at 28, but the agency neglected to state how this notice should be given.

[3] For one thing, as Judge Munson concluded and as OHA has again found (see Mobil's July 9 letter to this Court at 5), DOE does not even know which companies have caused the disappearance of crude oil. OHA further found that DOE "shows no inclination to obtain such knowledge." *Ibid.* And OHA itself has now turned its back on the information-gathering proceeding that could have provided the answers. *Id.* at 1-3. There is thus no realistic possibility that the necessary information can appear before August 15 (unless the inventory manipulators suddenly, and voluntarily, confess) to be included in the clean-up list. Nor does Mobil know which firms are responsible. Mobil's proof before Judge Munson was based on cumulative data published by DOE. Mobil does not have access to any company-by-company information, except, of course, information regarding Mobil itself.

Under the DOE's "post-clean-up list regulations," § 211.69(h), a party must have "an order no longer subject to appeal," *id.* § 211.69(h)(2)(i), that declares that the person "is entitled to a claim against the entitlement program. . . ." *Id.* If such an order is obtained, each firm listed on the DOE's final clean-up list supposedly shall "owe" a portion of the claim. Each firm's portion is determined according to a formula that is based upon the proportion of each firm's crude oil runs to stills compared to all refiners' runs to stills for the period October 1, 1980 to January 27, 1981. *Id.* § 211.69(h)(2)(ii).

It is obvious that this device, even if valid, is unsuited to redress the problem of disappearing crude oil. Mobil has shown that some as yet unidentified refiners have distorted the entitlements system by keeping price-controlled oil out of it, thereby avoiding their entitlements obligations and injuring every other refiner in the program which did not engage in those practices. But if Mobil used the post-clean-up list mechanism, that mechanism would spread financial responsibility for disappearing price-controlled crude oil to *every* refiner (each having to pay a proportionate share based on its runs to stills), both those that had caused the problem and those that were victims of it.

Thus, the mechanism would require firms that did not abuse the entitlements program through manipulative inventory practices to shoulder a portion of the burden of repayment. In fact, under the DOE's formula Mobil would "owe" itself money if it submitted a claim for overpayment due to the disappearance of crude oil.[4] By its express terms, therefore, the DOE's post-clean-up mechanism was not designed to and could not make Mobil whole for injury arising

[4] This penalty results from the requirement in the formula that the denominator be equal to "the sum of the crude oil runs-to-stills for *all* firms used to compute Entitlements Notices in the reporting period." 10 C.F.R. § 211.69(h)(2)(ii). For this reason alone Mobil could not possibly be made whole.

from the DOE's mismanagement of the entitlements program.[5]

Moreover, the legal validity of the process is open to severe question. As we have noted, the mechanism is supposed to work as follows: if a company obtains a final judgment against "the entitlements program," each other refiner "shall owe" a proportionate amount to that company (§ 211.69(h)(1)(i) and (ii)). While the regulations themselves do not say so, a violation of these regulations is a crime and also subjects the violator to a massive daily civil penalty (section 5 of the EPAA as amended). Thus, the effect of the regulations is that if company A gets a judgment that "the entitlements program" owes it money, it becomes a crime for other refiners not to pay under the formula even if the other refiners were not parties to company A's lawsuit. It is certainly doubtful that any company can, consistent with the Constitution, be forced to pay such money, on pain of criminal and civil penalties, when that company has not been a party to the adjudication of its liability.[6]

There is also a substantial question going to the procedural validity of these regulations. The DOE's Notice of Proposed Rulemaking did not include proposed regulations

[5] The regulations also purport to contain a mechanism by which liability may be fastened on parties who have "an obligation to the entitlements program." § 211.69(h)(2). This is merely a variation on DOE's former refrain that Mobil may obtain relief from suing inventory manipulators individually. In addition to the reasons given at footnote 26, page 38 of Mobil's Brief as Appellee in this Court, Mobil is unaware of which companies are responsible for the crude oil disappearance. Moreover, of course, as noted in footnote 38, it is entirely unclear whether the courts would entertain such lawsuits, and of course a DOE regulation cannot create or alter a judicial cause of action. If anything, DOE's stated purpose to walk away from problems it created and invite the courts to deal with those problems in the form of hundreds and hundreds of lawsuits, is, if anything, a substantial reason for courts to refuse the invitation.

[6] It is even doubtful whether the regulations are enforceable at all in light of the fact that the EPAA — the statutory authorization for civil and criminal sanctions — expires September 30, 1981.

even remotely resembling the regulations adopted by the agency to deal with post-clean-up list adjustments. By neglecting to issue such regulations as proposals, the agency may have unlawfully deprived the industry of its statutory right to submit comments. *See, e.g., American Frozen Food Institute* v. *Train*, 539 F.2d 107, 135 (D.C. Cir. 1976) (controls on fourth pollutant invalidated because Notice of Proposed Rulemaking mentioned only three pollutants). Thus, it is entirely conceivable that these regulations will be subject to attack on constitutional and other grounds, should Mobil or any other firm seek to recover a money judgment under them, and if the attack is upheld, Mobil would be left with no remedy at all.

In short, the DOE's clean-up regulations do not provide Mobil with an adequate remedy in the event that it prevails on the merits of this case. These regulations cannot by their own terms make Mobil whole. They furthermore shift the burden of providing relief to firms injured by the DOE's own mismanagement of the entitlements program to firms that quite likely did not engage in manipulative inventory practices in the first place. They are, moreover, of dubious legal validity. If they are ultimately struck down, Mobil would be left without any remedy at all. Accordingly, Mobil submits that the DOE's issuance of these clean-up regulations simply has no bearing on the issues of this case.

Respectfully submitted,

AKIN, GUMP, STRAUSS, HAUER & FELD

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Counsel of Record

Appendix

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No. 81-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, JAMES B. EDWARDS, SECRETARY OF ENERGY, AND TOSCO CORPORATION,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

A LISTING PURSUANT TO RULE 28.1

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A LISTING PURSUANT TO RULE 28.1

The petitioner Mobil Oil Corporation is a wholly-owned subsidiary of Mobil Corporation. Listed below are the affiliates and subsidiaries of Mobil Corporation, Mobil Oil Corporation, and their affiliates and subsidiaries that are or may be publicly held. For purposes of this list only companies in which a five percent or greater interest is held are included:

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH
AK Chemie GmbH
AK Chemie GmbH & Co KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.

Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Enterprises, Inc.
Alyeska Pipeline Service Company
Arabian American Oil Company
The Arabian Petroleum Supply Company (S.A.)
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
Ammenn GmbH
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
Atlas Sahara S.A.
Australasian Petroleum Company Proprietary Limited
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gasellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anomim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
B.V. Beheersmaatschappij Mobem
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Celmisia Shipping Corporation
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha

Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colonial Pipeline Company
Comet-Brennstoffdienst GmbH
Comex-Seal France S.A.
Comex-Seal Guernsey Ltd.
Comex-Seal Limited
Comex-Seal U.K. Limited
Comex-Seal U.S. Corporation
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.
Consortium Raymond Duez
Cook Inlet Pipe Line Company
Croager Bros. (1962) Limited
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nippon Jushi K.K.
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Transalpine Oelleitung GmbH
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Deutsche Pentosin — Werke GmbH

Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erdoel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
FACEL
Felix Oil Company
Filtroleo-Sociedade Portuguesa de Filtros Lda.
Filtros De Costa Rica S.A.
Finsbury Printing Limited
Frome-Broken Hill Company Proprietary Limited
Fruehmesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gaz Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Germ Lubricants Limited
Froehmesser Mineraloelhandels GmbH & Co. KG
Gesellschaft fur Umweltschutz und Beseitigung von Ol-und chemischen Abfallen Gesellschaft mbH
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
H. E. Oils Limited
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited

Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited
Island Exploration Company Proprietary Limited
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K. Allan & Company Limited
K. K. Sankyo Plastics
K. K. Toresen
Kanto Kygnus Sekiyu Hambai K. K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kygnus Ekika Gas Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokuto Kekiyu Kogyo Kabushiki Kaisha
Les Supermarches De Cote D'Ivoire
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Michael Beecham Limited
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Oil Maroc
Modern Buildings Membranes Ltd.
Mosul Petroleum Company Limited

Motel Rest SA
Motrate Products Limited
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Orcene Company Limited, The
Osage Pipe Line Company
P. T. Arun Natural Gas Liquefaction Company
P. T. Stanvac Indonesia
Pars Investment Corporation
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Pétroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Pipe-Lines de la Pallice
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.

Ragosine Oil Company Limited
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Roc Lubricants Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company
Sanwa Kasei Kogyo Kabushiki Kaisha
Sarni S.p.A.
Saudi Can Company, Ltd., The
Saudi Maritime Company
Saudi Maritime Company Ltd.
Saudi, Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
Seal Participants (Holdings) Limited
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil

Societe Dahomeenne d'Entreposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de Produits Petroliers
Societe Nationale de Raffinage (Sonara)
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Tahitienne de Depots Petroliers
Societe Tchadienne D'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T. R. Miller Mill Company, Inc.
Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH

Tecklenburg GmbH & Co.
Texoma Pipe Line Company
Thailand Lubricant Products Limited
Thailand Solvent Products, Ltd.
Thomas Moscrop (Lion Oils) Limited
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
United Kingdom Oil Pipelines Limited
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire Services Des Entreprises Petrolieres
Ankara Gaz Satis Anonim Sirketi
Arabian International Maritime Company Limited
ATAS — Anadolu Tasfiyehanesi Anonim Sirketi
Bayerische Mineral-Industrie A.G.
Benoil S.A.
Cercera S.A.
Combustibles Colmeraver
Colombianos Distribuidores de Combustibles, S.A.
Compagnie Immobiliere
Compagnie Regionale de Distribution de Produits Petroliers-
C.O.R.E. Dis.

Constructora Calle 70, S.A.
CORCOP
C.R.C. Lyon Chauffage
CRCP
Deutsche Mobil Oil Exploration Ireland Ltd.
Emoleum (Asphalts) Limited
Emoleum (NZ) Limited
Etablissements Pierre Boiron
Faavang Autoverksted A/S
Imperial Gas Co. of P.R., Inc.
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Les Nouveaux Comptoirs Petroliers
Mei Foo Investments Limited
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil-Comercio, Industria e Servicos Ltda.
Mobil Development Norway A/S
Mobil Exploration Barbados Ltd.
Mobil Gaz-Mobil Petrol Gazlari. Anonim Sirketi
Mobil Investments A.G.
Mobil Oil Aktiengesellschaft in Deutschland
Mobil Oil Angola, SARL
Mobil Oil A/S
Mobil Oil Cameroun
Mobil Oil Company Limited
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey
Mobil Oil de Chile Limitada
Mobil Oil Del Peru
Mobil Oil do Brasil (Industria e Comercio) Ltda.
Mobil Oil Djibouti, S.A.
Mobil Oil Egypt (S.A.)
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Guinee S.A.R.L.
Mobil Oil Haute Volta

Mobil Oil Hellas A. E. Petroleum Company
Mobil Oil Holdings S.A.
Mobil Oil Mali
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil oy ab
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Raffinerie G.m.b.H.
Mobil Oil Raffinerie GmbH
Mobil Oil Raffinerie Worth G.m.b.H. & Co. oHG
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil (Switzerland)
Mobil Oil Tchad
Mobil Oil Tecnica de Chile, Ltda.
Mobil Oil Thailand Limited
Mobil Oil Togo
Mobil Oil Turk Anonim Sirketi
Mobil Plastics S.p.A.
Mobil Producing Nigeria
Mobil Quimica Ltda.
Mobilrex
Mobil Tankships Limited
Mobil — Trans Ocean Company
Mobil Tunisie
Mobil Tyco Solar Energy Corporation
Morem
Offene Handelsgesellschaft Mobil Oil A.G. in Deutschland & Co.
150 East 42nd Street Corporation
Petroleum Refineries (Austrialia) Proprietary L mited
S.A. Mas & Cie
SARL Garage Pineau
S.C.I. DuFonds Du Val
R. Simonnet & CIE
Sociedade Portugal Marrocos SARL

Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe de Maperialx d' Etancheite Pour Le Entreprises (Meple)
Societe de Renovation D'Emballages Metalliques
Societe des Etablissements Goux
Societe Francaise Stoner-Mudge
Societe Lemetayer
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Regionale De Produits Petroliers
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
Station-Service Lunes
Toulouse — Distribution Produits Petroliers
Zaire Mobil Oil
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celulosa y Papel de Columbia, S.A.
Corrugadora de Carton, S.A.
Highgate Associates, Ltd.
Industria de Carbon del Valle Cauca, S.A.
MW-Export, S.A. De C.V.
Molinos de Carton y Papel, S.A.
Montgomery Ward Hong Kong, Ltd.
150 East 42nd Street Corporation
Reforestadora Andina, S.A.
Union Grafica, S.A.
VOSACEC, S.P.A.

Opposition

1

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No. 81-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,
Petitioner,
v.

UNITED STATES DEPARTMENT OF ENERGY,
JAMES B. EDWARDS, SECRETARY OF ENERGY,
AND TOSCO CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals

---

MEMORANDUM IN OPPOSITION FOR RESPONDENT TOSCO CORPORATION

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EUGENE M. GOOTT
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QUESTIONS PRESENTED

1. Whether Section 211(e)(1) of the Economic Stabilization Act, which denies district courts the jurisdiction to grant a preliminary injunction of general applicability restraining a DOE program or order, contains an unstated exception which would permit the injunction issued by the district court in this matter.*

2. Whether TECA applied an improper standard of appellate review.

3. Whether TECA applied an incorrect standard for preliminary injunctive relief.

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* This jurisdictional question was not presented by Mobil in its petition. It would have to be reached, however, if this Court were to decide in Mobil's favor on the other questions presented.

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IN THE

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OCTOBER TERM, 1981

No. 81-499

MOBIL OIL CORPORATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,
JAMES B. EDWARDS, SECRETARY OF ENERGY,
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Respondents.

On Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals

---

MEMORANDUM IN OPPOSITION FOR RESPONDENT TOSCO CORPORATION

INTRODUCTION

Respondent Tosco Corporation ("Tosco") opposes the petition for writ of certiorari.[1]

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[1] Tosco has no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates. See Rule 28.1 of the Rules of this Court.

SUPPLEMENTAL STATUTES AND REGULATIONS INVOLVED

Section 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 754(a)(1), and Section 211.69 of the Mandatory Petroleum Allocation Regulations, 46 Fed. Reg. 36098 (July 13, 1981), to be codified at 10 C.F.R. § 211.69, are reprinted in the separate Appendix as Appendices A, B, and C, respectively.

SUPPLEMENTAL STATEMENT OF THE CASE

At issue in this petition for writ of certiorari is the attempt of Mobil Oil Corporation ("Mobil") to further postpone its regulatory obligations under the Entitlements Program administered by Respondent Department of Energy ("DOE"). To date, Mobil and other refiners have succeeded in delaying for over six months the discharge of their obligations under the Entitlements Notice for January 1981. They have done so even though the January Notice will be followed by both a "clean-up" Entitlements Notice and a subsequent "clean-up" mechanism which will fully protect Mobil and other refiners from any threat of irreparable injury and even though courts have the inherent authority to order any relief to which those refiners may be found entitled. As a result of this delay, Mobil has already received a windfall benefit of approximately $4.5 million,[2] while Tosco and other entitlement sellers, including many small and independent refiners, have been deprived of the funds to which they are entitled due to their limited access to

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[2] Based upon 18 percent simple interest for six months on Mobil's claimed $50 million January entitlements obligation.

price-controlled crude oil during January 1981.[3] The total cost which the delay has thus far imposed on such firms is approximately $45 million, with Tosco's loss alone exceeding $600,000.[4]

A. Regulatory Background

As a consequence of the crude oil price-control regulations administered by DOE, 10 C.F.R. Part 210, Subpart D, a limited quantity of low-cost, price-controlled crude oil was available to refiners each month. The remainder of the domestic and world supply of crude oil was sold at markedly higher, uncontrolled prices. The Entitlements Program, 10 C.F.R. § 211.67, was designed to fulfill DOE's statutory duty to "provid[e] for the mandatory allocation of crude oil", 15 U.S.C. § 753(a), Pet. App. at 92a, by requiring refiners, such as Mobil, which obtained a greater than average share of low-cost, price-controlled crude oil to make cost-equalizing payments to other refiners, such as Tosco, which have been required to purchase a greater than average share of high priced, uncontrolled crude oil. Substantial amounts of money have been transferred under the Program each month in order to distribute equitably the benefits of access to price-controlled crude oil.

The Entitlements Notice for January 1981 ("January Notice") was required by regulation to be issued by March 15, 1981. Payments thereunder were due by March 31. 10 C.F.R. § 211.67. The January Notice is to be based on reported crude oil receipts for the period

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[3] In its petition, Mobil incorrectly asserts that the district court made a finding of fact that DOE and other parties, such as Tosco, would not be hurt by a preliminary injunction. Mobil Petition at 16. This contention is demonstrably incorrect. *See* district court opinion at 68 (Appendix to Petition ("Pet. App.") at 80a-81a).

[4] Based upon 18 percent simple interest for six months on an estimated total amount of $500 million to be transferred under the January Notice and Tosco's estimated share of at least $7 million.

between January 1, 1981 and January 27, 1981, the day before President Reagan terminated all petroleum price and allocation controls. Exec. Order No. 12287, 46 Fed. Reg. 9909 (printed Jan. 30, 1981). President Reagan's decontrol order specifically authorizes DOE both to issue the January Notice after the date of decontrol and to establish a "mechanism for entitlements adjustments for periods prior to [the] Order." *Id.*

Beginning in early March, a number of refiners sought to delay the issuance of the January Notice by seeking, often on an *ex parte* basis, temporary restraining orders and preliminary injunctions from various district courts. In response to arguments presented by DOE, Tosco and other refiners, preliminary relief was either denied or, where initially granted, was vacated or modified to permit issuance of the January Notice. However, the cumulative effect of these injunctions has been to prevent the issuance of the January Notice for almost seven months. The injunction in effect in this case is currently the only bar to issuance of the January Notice.[5]

Some of these lawsuits, including that brought by Mobil, were based on the claims that the Entitlements Program had been distorted by manipulative inventory practices engaged in by certain refiners. These practices would have benefitted the firms who engaged in such manipulations by reducing their obligations or increasing their benefits under the Entitlements Program. A countervailing burden was imposed proportionately on all other participants in the Entitlements Program, including firms obligated to make entitlement payments,

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[5] Certain district courts have issued preliminary injunctions which either permit or require the issuance of the January Notice, but which contain provisions for the creation of escrow funds for particular parties. *E.g., Little America Refining Co.* v. *DOE*, Civ. Action No. C81-0263 (D. Wyo. Sept. 22, 1981) (Exhibit B to Application of Little America Refining Co. for Leave to Intervene in No. A-192 and Motion for Modification of Stay).

such as Mobil, and firms entitled to receive entitlement revenues, such as Tosco. In contrast, the delay in the issuance of the January Notice caused by the district court injunctions has benefitted Mobil and other entitlement payors, while further injuring Tosco and other entitlement recipients.[6] The result of this delay in the implementation of the cost equalization provisions of the Entitlements Program has been to permit certain companies to retain the advantage of lower crude oil costs due to their disproportionate access to price-controlled crude oil, while requiring other companies to continue to bear the burden of higher crude oil costs due to their having been required to purchase a disproportionate share of higher-priced, uncontrolled crude oil.

On January 9, 1981, after the district court injunction was issued, DOE promulgated regulations providing for the issuance of a "clean-up" Entitlements Notice pursuant to President Reagan's decontrol order. 46 Fed. Reg. 36092 (July 13, 1981). This "clean-up" Notice, which is to be issued after the January Notice, is designed to implement, *inter alia*, any adjustments to prior entitlements rights or obligations necessitated by judicial or administrative decisions. *Id.* The regulations promulgated by DOE also established a mechanism for the implementation of any additional entitlement adjustments which might be required by judicial or administrative decisions issued after the "clean-up" Notice. *Id.*

B. Proceedings Before The Temporary Emergency Court of Appeals

On June 17, 1981, after extensive briefing by all parties, TECA heard oral argument on DOE's appeal of the district court injunction in this case. Following oral argument, Mobil initiated another round of letter-briefing,

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[6] It should be noted in this regard that almost all of the firms which have filed amicus briefs in support of Mobil have stated that they would be purchasers under the January Notice.

in which DOE's newly-issued entitlement "clean-up" regulations were submitted to TECA and thoroughly discussed by all parties.[7] On August 14, 1981, based on its determination that "it is clear . . . that Mobil has remedies which will give it an opportunity to have its claims reviewed and adjudicated", Pet. App. at 5a-6a, TECA unanimously reversed the district court's order.

On September 2, 1981, after further briefing by all parties, TECA unanimously denied Mobil's motion for a stay of its mandate.

On September 3, 1981, Mr. Justice Brennan temporarily granted a stay of TECA's mandate.

REASONS FOR DENYING THE PETITION

A. The District Court Had No Jurisdiction To Issue Such An Injunction

Even if this Court were to conclude that Mobil is correct in its assertions regarding errors allegedly committed by TECA, the Court would still be required to affirm the result reached by TECA because the district court lacked jurisdiction to issue such interlocutory relief. This jurisdictional issue was briefed and argued before TECA. However, TECA did not find it necessary to reach the issue in light of its finding that Mobil had not demonstrated irreparable injury. Pet. App. at 7a.

Section 211(e)(1) of the Economic Stabilization Act of 1970 ("ESA"), as amended, 12 U.S.C. § 1904 note,[8] divests the district courts of jurisdiction to issue any injunctive relief, temporary or permanent, which would restrain the operation of a DOE regulatory program:

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[7] See Attachment 2 to Tosco's letter to this Court of September 4, 1981 and Exhibit D to Mobil's September 3, 1981 Application for Stay (Case No. A-192).

[8] Section 211 of ESA is made applicable to the Entitlements Program by Section 5(a)(1) of the Emergency Petroleum Allocation Act. 15 U.S.C. § 754(a)(1).

> Except as provided in subsection (d) of this section [pertaining to preliminary injunctions applicable only to a particular party before the court] [9] no interlocutory or permanent injunction restraining the enforcement, operation or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. . . .

This provision thus prohibits the district courts from "enjoin[ing] the operation of any part of the program or set[ting] aside any regulation or order" issued by DOE until TECA, the specialized national court of appeals created by Congress to review DOE matters, has reached a final determination on the merits of the case. S. Rep. No. 92-507, 92d Cong., 1st Sess. (1971), *reprinted in* [1971] U.S. Code Cong. & Ad. News 2283, 2293-94. *See Exxon Corp* v. *FEA*, 516 F.2d 1397, 1400-01 (TECA 1975). It was intended to assure that there would be "no breaks or gaps [in the regulatory program] unless following a *final judicial action*", 117 Cong. Rec. S19816 (daily ed. Nov. 30, 1971) (remarks of Senator Tower) (emphasis added), and was the result of a congressional decision not to permit an individual party to halt the operation of the price and allocation control program by obtaining a preliminary injunction.[10] *Gulf Oil Corp* v. *DOE*, 514 F. Supp. 1019, 1023-24 (D.D.C. 1981);

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[9] Because Subsection (d) permits only the issuance of a preliminary injunction which applies solely to the *application* of a program to a *particular* party before the district court, it is not relevant here. *See, United States* v. *Gulf Oil Corp.*, 408 F. Supp. 450, 462-63 (W.D. Pa. 1975).

[10] This congressional objective of avoiding breaks and gaps in the Entitlements Program is equally as important at the end of the Program as it was in the beginning. Indeed, the importance of this congressional objective was emphasized by President Reagan's attempt to provide an orderly process for decontrol, the implementation of which has thus far been frustrated by the district court's order.

Certified Gasoline Co. v. *DOE*, No. C-2-81-379, slip op. at 7-9, (S.D. Ohio Apr. 20, 1981);[11] *U.S. Oil Co.* v. *DOE*, 510 F. Supp. 910, 914 (E.D. Wis. 1981). *See McGuire Shaft & Tunnel Corp.* v. *Local 1791, UMW*, 475 F.2d 1209, 1213 (TECA), *cert. denied*, 412 U.S. 958 (1973).

The injunction issued by the district court in this case patently restrains the operation and enforcement both of the DOE regulations which constitute the Entitlements Program and of the January Notice itself, which is an order issued thereunder. It thus falls squarely within the prohibition of Subsection 211(e)(1).

The district court below acknowledged that Section 211 "appeared" to prohibit its injunction, but held that its action was somehow exempt from that ban because it was consistent with the underlying purposes of the Emergency Petroleum Allocation Act ("EPAA"). Pet. App. at 81a-85a. This interpretation is contrary to the unambiguous language of Section 211 of the ESA, which contains no exception. Moreover, the district court's reasoning directly contradicts both the legislative history of Section 211 and the case law construing it, and would undermine the congressional intent to prevent breaks and gaps in DOE regulatory programs. Indeed, the "exception" created by Judge Munson would effectively swallow the rule set forth in Section 211(e), for it is unlikely that a district court would enjoin the operation of a DOE regulation or order issued under the EPAA if it believed that such an injunction would be inconsistent with the EPAA.[12]

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[11] All cases which are cited in this Memorandum but which are not officially reported have already been supplied to this Court as exhibits to Tosco's September 10, 1981 Brief in Opposition to Stay.

[12] Moreover, the rationale of Judge Munson's asserted exception would apply equally well to injunctions which would effectuate constitutional, and perhaps other statutory, rights if the judge

The jurisdictional limitations of Section 211 [13] were the result of careful and deliberate consideration by both houses of Congress. Under the bill initially adopted by the House of Representatives, for example, both the district courts and TECA were flatly prohibited from granting *any* type of interlocutory relief. H.R. 11304, § 211(b)(4) and (e), 92d Cong., 1st Sess., 117 Cong. Rec. H12213-14 (daily ed. Dec. 10, 1971).

The Senate version was only slightly less restrictive. Its bill denied district courts the authority to grant interlocutory relief, except with respect to the *application* of a regulation or order to a particular party before the court. S. 2891, 92d Cong., 1st Sess. § 211 (1971). The limited nature of this exception was emphasized by the Senate Report:

> The injunctive power of the district court in cases under this Act is restricted to the application of a particular regulation or order to a particular person who is a party to the litigation before it. . . . [T]he district court may not enjoin the operation of any part or the program or set aside any regulation or order issued under the Act.

S. Rep. No. 92-507, 92d Cong., 1st Sess., *reprinted* in [1971], U.S. Code Cong. & Ad. News 2283, 2294.[14] The Conference Committee subsequently adopted the less re-

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could conclude that Congress would have wanted those rights effectuated.

[13] Section 211 was added to the ESA in 1971, Pub. L. No. 92-210, codified at 12 U.S.C. § 1904 note.

[14] The Senate also specifically considered and rejected an amendment proposed by Senator Metcalf which would have allowed district courts to issue interlocutory relief, subject to expedited review by TECA. 117 Cong. Rec. S19815-16 (daily ed. Nov. 30, 1971). The opponents of this amendment, most notably Senators Sparkman and Tower, floor leaders of the bill, explained that the limited power given to district courts to protect particular parties was adequate and that any broader injunctive power would "pose a serious threat to" the operation of the Act. *Id.*

strictive, but still very limited, Senate version. H. Conf. Rep. No. 92-754, 92d Cong., 1st Sess., *reprinted in* [1971] U.S. Code Cong. & Ad. News 2307, 2310.

Both TECA and a number of district courts have recognized that § 211(e) prohibits preliminary injunctions restraining the operation of a DOE regulatory program or the enforcement or execution of an agency order of general applicability. *See, e.g., McGuire Shaft & Tunnel Corp.* v. *Local 1791, UMW*, 475 F.2d 1209, 1213 (TECA), *cert. denied*, 412 U.S. 958 (1973); *U.S. Oil Co.* v. *DOE*, 510 F. Supp. 910, 914 (E.D. Wisc. 1981); *Gulf Oil Corp.* v. *DOE*, 514 F. Supp. 1019, 1023-24 (D.D.C. 1981); *Certified Gasoline Co.* v. *DOE*, No. C-2-81-379, slip op. at 7-9 (S.D. Ohio Apr. 20, 1981). In *U.S. Oil Co.*, for example, the court explained:

> The district court's authority is limited to making a declaration of the rights of the parties. An aggrieved party may then seek an order from the Temporary Emergency Court of Appeals (TECA) for an injunction. . . .
>
> The only exception to the limitation on the district court's injunctive power is contained in section 211(d) of the ESA. That section provides that a district court may issue a preliminary injunction enjoining the application of a particular order to a person before the court. . . . Third parties do not come within the exception.

510 F. Supp. 914. *See Pennzoil Co.* v. *DOE*, 480 F. Supp. 1126, 1133 (D. Del. 1979) (Section 211(d)(2) "affords the sole means by which a party may obtain *pendente lite* relief in cases under the [EPAA]"). As these courts have recognized, Congress did not intend for district courts to determine when a DOE program, regulation or order should be enjoined. It specifically left that task to the specialized court which it had created for the specific purpose of reviewing matters arising under the EPAA—TECA.

B. TECA Properly Determined That Mobil Would Not Suffer Any Irreparable Harm If A Preliminary Injunction Was Denied

TECA's decision to vacate the district court's injunction was based on its determination that "it is clear at this writing that Mobil has remedies which will give it an opportunity to have its claims reviewed and adjudicated." Pet. App. at 5a. In reaching this determination, TECA applied its expertise in matters involving the energy regulatory programs administered by DOE and concluded that there are a number of avenues for adequate administrative and judicial relief open to Mobil. Thus, TECA was correct in finding that Mobil had failed to demonstrate any threat of irreparable harm. TECA's decision to vacate the injunction was therefore in accordance with the standards set out by this Court and by other courts.

This Court has previously stated that "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson* v. *Murray*, 415 U.S. 61, 88 (1974) (quoting from *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 506-07 (1959)). And in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975), the Court reiterated that the issuance of a preliminary injunction requires a showing by the applicant that he will suffer irreparable harm and also that he is likely to prevail on the merits.[15] As the Second Circuit has explained, "a clear showing of the

[15] Even if those two basic requirements are met, the Court added, "a district court must weigh carefully the interests on both sides." *Doran*, 422 U.S. at 931. When read in context, it is clear that this balancing test was imposed by the Court in addition to, and not as an alternative to, the two prerequisites set out above. The purpose of this additional requirement is, of course, to assure that the interests of adverse parties and the general public are considered before a district court grants an injunction which satisfies the other criteria.

threat of irreparable harm . . . is a fundamental and traditional requirement of all preliminary injunctive relief, since equity cannot intervene where there is an adequate remedy at law."[16] *Triebwasser & Katz* v. *American Tel. & Tel. Co.*, 535 F.2d 1356, 1359 (2d Cir. 1976) (citation omitted).

These cases illustrate the fundamental principle that an applicant seeking preliminary injunctive relief must, at a minimum, show both the likelihood of harm and the irreparability of any such harm. Injury which is not irreparable or which can be redressed through other avenues of relief, cannot justify an injunction. The Court of Appeals for the District of Columbia has explained:

> The key word in this consideration [of irreparable injury] is *irreparable*. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Virginia Petroleum Jobbers Ass'n v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (emphasis in original). *See, e.g.*, *Glasco* v. *Hills*, 558 F.2d 179 (3d Cir. 1977) (possible recovery by proper action at law precludes preliminary injunction); *United States* v. *Pennsylvania*, 533 F.2d 107, 110 (3rd Cir. 1976); *Jackson Dairy, Inc.* v. *H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979). This Court has refused injunctive relief, without discussing any other legal prerequisites, where the Court determined that adequate legal remedies would be available. *E.g.*, *Sampson* v. *Murray*, *supra*, 415 U.S. at 90-91. TECA has determined unanimously that Mobil has other available avenues of relief and that issuance of the January

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[16] Mobil is therefore incorrect when it asserts, Petition at 14, n.9, that this requirement does not apply to preliminary relief. *See Sampson* v. *Murray*, *supra*, 415 U.S. at 88.

Notice would not cause any irreparable injury to Mobil. Its conclusion in this regard is correct.

The "clean up" regulations provide one avenue through which Mobil may obtain a remedy if Mobil is correct on the underlying merits.[17] Once DOE or the courts have determined what, if any, adjustments should be made, these adjustments can be made through the "clean-up" Entitlements Notice, if the DOE determination or judicial order precedes issuance of that Notice, or through the "post-clean-up" mechanism, if the determination or order comes after the "clean-up" Notice is issued.[18] As TECA noted, Mobil is free to file an administrative appeal if it is dissatisfied with the mechanisms provided for by the "clean up" regulations. Pet. App. at 6a. Moreover, Mobil is, and has been, free to challenge the clean-up regulations in court, and to seek to postpone issuance of the "clean-up" Notice if it believes that such a delay is necessary to preserve this remedy. Because the January Notice is *not* the last Entitlements Notice and will be followed by both the "clean-up" Notice and the subsequent "clean-up" mechanism, there is no need to enjoin the January Notice to prevent any possible "irreparable injury" to Mobil.

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[17] TECA also determined that Mobil has at least two other available remedies: 1) judicial review of the denial by DOE's Office of Hearings and Appeals of Mobil's appeal of the Entitlements Notice for December, 1980; and 2) Mobil's rulemaking petition which is pending before DOE. Pet. App. at 5a.

[18] Although, due to the necessary limitations on the scope of the rulemaking, the "clean-up" regulations do not themselves attempt to resolve the merits of Mobil's claim, it is clear that they were intended to, and do, provide a mechanism or conduit through which relief can be implemented once DOE, or a court, decides what relief is warranted. *See* 46 Fed. Reg. at 36093. Mobil's assertion that TECA's decision would leave it dependent upon DOE for a remedy, Petition at 18-20, is thus incorrect. The "clean-up" regulations apply to court-ordered relief equally as well as to agency determinations.

Even if these remedies did not exist, there can be no doubt that courts possess the authority to order DOE to take any action necessary to correct the effects of any agency action under the Entitlements Program which may be found unlawful. *Howell Corp.* v. *DOE*, No. H-81-628, slip op. at 6 (S.D. Tex. Apr. 22, 1981). *See United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965), *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939); *Indiana & Michigan Elec. Co.* v. *FPC*, 502 F.2d 336, 346-48 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); *Marathon Oil Co.* v. *DOE*, 482 F. Supp. 651, 659-660 (D.D.C. 1979). The essence of Mobil's argument is that DOE acted unlawfully by failing to amend its regulations and otherwise to administer the Entitlements Program so as to prevent the alleged manipulatory practices. If DOE's action or inaction is determined by a court to have been unlawful, that court would certainly have the inherent power to order any correction of DOE's error as may be necessary to bring the Program into accordance with the law and to "undo what is wrongfully done . . . ." *United Gas Improvement Co.* v. *Callery Properties, Inc., supra*, 382 U.S. at 229.[19] In addition, Mobil would be able to file suit to obtain restitution from any firms which are ultimately found responsible for the "disappearance." *Howell Corp.* v. *DOE, supra*, slip op at 6-7.

Accordingly, as TECA and the district courts which denied or vacated preliminary injunctive relief[20] have

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[19] This equitable power would remain in the courts even if DOE's statutory authority to grant such a remedy had expired. *See Indiana & Michigan Elec. Co., supra*, 502 F.2d at 343.

[20] *See, e.g., Gulf Oil Corp.* v. *DOE*, 514 F. Supp. 1019, 1026-27 (D.D.C. 1981) (any possible harm found not to be irreparable due to proposed promulgation of "clean-up" regulations) *Consumers Power Co.* v. *DOE*, 4 En Mgmt (CCH) ¶ 26,297 at 28,301-28,302 (E.D. Mich. Apr. 24, 1981).

determined, Mobil does have adequate remedies for any harm which it may suffer. Thus, there is no irreparable injury, and TECA's decision to reverse the lower court was proper.

C. TECA Did Not Apply An Incorrect Standard of Review

The abuse of discretion standard for appellate review of a district court's grant or denial of preliminary injunctive relief is universally recognized by the appellate courts, including TECA. *See, e.g., Meccano, Ltd.* v. *John Wanamaker*, 253 U.S. 136, 141 (1970); *Clements Wire & Mfg. Co.* v. *NLRB*, 589 F.2d 894, 897 (5th Cir. 1979); *Taylor Wine Co.* v. *Bully Hill Vineyards, Inc.*, 569 F.2d 731, 732 n.1 (2d Cir. 1978); *League of Voluntary Hosps. & Homes* v. *Local 1199, Drug and Hosp. Union*, 490 F.2d 1398, 1401 (TECA 1973); *McGuire Shaft & Tunnel Corp.* v. *Local 1791, UMW*, 475 F.2d 1209, 1215-16 (TECA), *cert. denied*, 412 U.S. 958 (1973); *Calabrese* v. *Local 69, United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Indus.*, 312 F.2d 256 (3rd Cir. 1963). The opinion of the three experienced judges who sat on the TECA panel in this matter does not suggest any disregard of that standard.[21] Indeed, TECA's express determination that "*it is clear* at this writing that Mobil has remedies which will give it an opportunity to have its claims reviewed and adjudicated," Pet. App. at 5a (emphasis added), demonstrates that TECA must necessarily have concluded that

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[21] Mobil's contrary allegations are premised upon the failure of TECA to mention that the district court had written an opinion and upon TECA's references to "Mobil's" explanations and showings. These arguments are without merit. There can be no doubt that TECA, which did note that the district court had issued an order and findings of fact, Pet. App. at 2a, was fully familiar with the district court's opinion; it was addressed at length both in the extensive briefs and in oral argument before TECA.

the district court abused its discretion when it found irreparable injury.

In any event, the grant of a preliminary injunction must be reversed if the district court has committed an error of law in applying the criteria governing interlocutory relief. *See, e.g., Clements Wire & Mfg.* v. *NLRB, supra,* 589 F.2d at 897; *California* v. *Tahoe Regional Planning Agency,* 516 F.2d 215, 217 (9th Cir.), *cert. denied,* 423 U.S. 868 (1975); *Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac* v. *Alexander's Dep't Stores, Inc.,* 299 F.2d 33, 35-36 (2d Cir. 1962). Such an error of law *per se* constitutes an abuse of discretion. *United States* v. *Beaty,* 288 F.2d 653 (6th Cir. 1961).[22] In this case, TECA utilized its special expertise in DOE matters and reviewed the district court's legal conclusions regarding the meaning and legal implications of the various avenues of administrative and judicial relief currently open to Mobil. Although the district court received a substantial amount of evidence and wrote a lengthy opinion concerning the merits of the "disappearing" oil problem, the court's factual findings on that issue were simply irrelevant to TECA's holding on irreparable injury.[23] TECA concluded that adequate legal remedies were clearly available to Mobil and that

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[22] In its petition, Mobil implies that errors of law are not freely reviewable and may be reviewed only for abuse of discretion. Petition at 10. As the cases cited above demonstrate, any such contention is patently incorrect. Moreover, the cases cited by Mobil do not stand for the proposition asserted. In *Texas Traction Co.* v. *Barron G. Collier, Inc.,* 195 F. 65, 66 (5th Cir. 1912), the court specifically stated that an injunction order may be reversed if "it is violative of the rules of equity or . . . there has been an abuse of discretion." The second case cited by Mobil, *Rahley* v. *Columbia Phonograph Co.,* 122 F. 623, 625 (4th Cir. 1903), dealt only with issues of fact.

[23] Indeed, only three pages of the district courts' 81-page opinion discussed the irreparable harm issue.

the district court's conclusions on the irreparable injury issue were erroneous as a matter of law. TECA therefore properly vacated the preliminary injunction.

Moreover, TECA's decision was based in part upon the issuance by DOE, subsequent to the district court's opinion, of final "clean-up" regulations. See Section B, *supra*. It is well-established that appellate courts may take judicial notice of changes in fact or law that arise while a case is on appeal and that they have the power to make such disposition of a case on appeal as justice may require in light of such developments. *See, e.g., Watts, Watts & Co.* v. *Unione Austriaca Di Navigazione*, 248 U.S. 9, 21 (1918); *Bryant* v. *Carleson*, 444 F.2d 353, 357-58 (9th Cir.), *cert. denied*, 404 U.S. 967 (1971); *Distinti* v. *Cunningham*, 272 F.2d 528, 529 (D.C. Cir. 1959); Fed. R. Evid. 201(f). In view of the need for prompt action in this case, TECA's decision to consider this new information and consequently to reverse the district court was an exercise of sound judicial administration. *E.g., Meccano, Ltd.* v. *John Wanamaker*, *supra*, 253 U.S. at 141; *Clements Wire & Mfg. Co.* v. *NLRB*, *supra*, 589 F.2d at 897. *See Warm Springs Dam Task Force* v. *Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980); *National Ass'n of Letter Carriers* v. *Sombrotto*, 449 F.2d 915, 920-21 (2d Cir. 1971).

Finally, Mobil attempts to bolster its petition by asserting that this case is somehow related to another matter currently pending before this Court. *United Steelworkers* v. *Swint*, No. 80-1193, *cert. granted*, 49 U.S.L.W. 3788 (Apr. 21, 1981). However, the limited question which this Court agreed to review in *Swint* is whether Rule 52(a) of the Federal Rules of Civil Procedure, which governs appellate review of trial court findings of fact, applies to the ultimate finding of fact in an employment discrimination suit (*i.e.*, defendant's possession of the requisite discrimination intent). A

decision in *Swint* could have no impact on this case, and vice versa. In any event, unlike *Swint*, this case does not involve either a conflict among the circuits[24] or an important question of federal law of the type to which this Court generally limits its review.[25]

D. There Is No Issue In This Case Regarding The Standards For A Preliminary Injunction

Mobil asserts as a second reason for review that TECA required Mobil to demonstrate with absolute certainty that it would suffer irreparable harm, and that such a requirement is at odds with the "balancing approach" allegedly adopted by other circuits. Mobil's contention ignores this Court's pronouncement that, no matter how the standard may be described, "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson* v. *Murray*, *supra*, 415 U.S. at 88. *See*, *e.g.*, *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d at 925; *United States* v. *Pennsylvania*, *supra*, 533 F.2d at 110-11; *United States Postal Service* v. *Brennan*, 579 F.2d 188, 191 (2d Cir. 1978); *County of Santa Barbara* v. *Hickel*, 426 F.2d 164, 168 (9th Cir. 1970), *cert. denied*, 400 U.S. 999 (1971). As the Second Circuit has explained, the so-called "balancing test"

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[24] As previously noted, TECA has expressly announced on several occasions its adherence to the universally accepted abuse of discretion standard.

[25] It has been stated on many occasions that this Court is primarily concerned with the resolution of difficult questions involving general principles of national significance and not with the correction of errors in lower court decisions. *See*, *e.g.*, *Ross* v. *Moffitt*, 417 U.S. 600, 616-17 (1974); *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923); Address by Mr. Chief Justice Vinson, *Work of the Federal Courts*, American Bar Association (Sept. 7, 1949), *reprinted in*, 69 S.Ct. v, vi (1949).

> does not eliminate the basic obligation of the plaintiff to make a clear showing of the threat of irreparable harm. That is a fundamental and traditional requirement of all preliminary injunctive relief, . . . since equity cannot intervene where there is an adequate remedy at law. . . . In sum, *the balancing of hardships test . . . necessarily includes the showing of irreparable harm.*

Triebwasser & Katz v. *American Tel. & Tel. Co., supra,* 535 F.2d at 1359 (citations omitted) (emphasis supplied). TECA determined that Mobil would clearly not suffer any irreparable harm. Given Mobil's failure to meet this basic threshold test, the questions which Mobil poses regarding the exact formulation of the standard are irrelevant and do not provide a basis for review.[26]

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[26] Moreover, TECA expressly relied in its opinion not only on the decision of this Court in *Sampson* v. *Murray,* but also on the holdings of the Second Circuit in *Triebwasser & Katz* and the D.C. Circuit in *Virginia Petroleum Jobbers Ass'n.* Both of these circuits are among the three which Mobil asserts apply a balancing approach in supposed conflict with TECA. Similarly, the Fifth Circuit, to which Mobil ascribes a rigid test, clearly utilizes a balancing approach, after the threshold test of irreparable injury is satisfied. *See, e.g., Martinez* v. *Mathews,* 544 F.2d 1233, 1243 (5th Cir. 1976); *Blackshear Residents Organization* v. *Romney,* 472 F.2d 1197, 1198 (5th Cir. 1973). As these cases illustrate, the balancing of equities approach is widely applied by the courts of appeal, but only after the initial showing of irreparable injury has been made. Mobil simply failed to make this threshold showing.

CONCLUSION

The January Entitlements Notice should not be further delayed by review of the TECA decision. As TECA properly determined, issuance of the January Entitlements Notice will not cause irreparable injury to Mobil. The issues which Mobil raises are not actually present in this case and are otherwise not appropriate for this Court's review. This Court should therefore deny Mobil's petition for writ of certiorari.

Respectfully submitted,

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Appendix

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No. 81-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,
JAMES B. EDWARDS, SECRETARY OF ENERGY,
AND TOSCO CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals

---

APPENDIX TO MEMORANDUM IN OPPOSITION FOR RESPONDENT TOSCO CORPORATION

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APPENDIX A

Section 211—Energy Stabilization Act of 1970

Pub. L. 91-379, August 15, 1970, as amended by Pub. L. 92-210. Codified at 12 U.S.C. § 1904 note.

CREDIT CONTROL

"(a) The district courts of the United States have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28].

"(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court

into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d)(2) of this section, the court shall not have power to issue an interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code [section 706(2) of Title 5], and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporariiy or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code [section 1292(b) of Title 28]; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code [section 706(2)

of Title 5], or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court, denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the

judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code [section 1254 of Title 28]. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section [Dec. 22, 1971] in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

APPENDIX B

Section 5(a)(1)—Emergency Petroleum Act of 1973

Pub. L. 93-159, Nov. 27, 1973, as amended by Pub. L. 94-163. Codified at 15 U.S.C. § 754(a)(1).

§ 754. Administration and enforcement; delegation of authority; civil and criminal penalties

(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President(or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

APPENDIX C

Section 211.69—Mandatory Petroleum Allocation Regulations

46 *Fed. Reg.* 36098 (July 13, 1981), to be codified at 10 C.F.R. § 211.69.

§ 211.69 Entitlements adjustment mechanism.

(a) Scope. This section applies to all refiners and other firms listed on any Entitlements Notice issued with respect to crude oil runs-to-stills and crude oil receipts during the period October 1, 1980, through January 27, 1981, as well as to any other firms which owe money to, or are entitled to receive money from, the entitlements program.

(b) Purpose. This section provides a method for an orderly termination of the domestic crude oil entitlements program originally established in § 211.67.

(c) Definitions. For purposes of this section, all terms that are contained in or necessary to the implementation of this section shall have the same meanings as under the provisions of 10 CFR Part 211 that were in effect on January 27, 1981, except as specifically set forth in the following definitions:

"Adjustment" means the receipt of an invoice of recertified crude oil previously booked into a refiner's account in a month during the reporting period which results in a change to the volume and/or category as previously reported on the ERA-49 and a subsequent invoice to a reported volume based on either a prior invoice or a good faith estimate. A good faith estimate is a volume based on that refiner's past experience as to its composition for pricing purposes of domestic crude oil of the same origin.

"Amendment" means a resubmission of a previously filed report for a month in the reporting period resulting from an internal company error.

"Claim" means the dollar amount determined by ERA to be owed to a firm resulting from adjustments, amendments or other modifications to any one or more Entitlements Notices issued by ERA pursuant to 10 CFR 211.67 for the period from October 1, 1980, through January 27, 1981, or resulting from an administrative or judicial determination.

"Crude oil runs-to-stills" includes crude oil runs-to-stills applicable to the Entitlements Notice issued for each month in the reporting period, increased for any month for which a firm received entitlements pursuant to §§ 211.67(a)(3) or 211.67(a)(5) by a number equal to the number of entitlements issued pursuant to these sections in that month, divided by the national domestic crude oil supply ratio for that month.

"ERA" means the Economic Regulatory Administration of the Department of Energy (DOE).

"Obligation" means the dollar amount determined by ERA to be owed by a firm as a result of adjustments, amendments or other modifications to any one or more Entitlements Notices issued by ERA pursuant to 10 CFR 211.67 for the period from October 1, 1980, through January 27, 1981, or resulting from an administrative or judicial determination.

"Reporting period" means the period October 1, 1980, through January 27, 1981.

(d) Determination of claims and obligations.—(1) Amendments. Firms shall correct all errors contained in reports filed pursuant to 10 CFR 211.66 or 10 CFR 211.67(a)(5)(ii) for the reporting period by filing amended reports which must be received by ERA by

August 15, 1981. For each month for which an amended report is filed by a firm pursuant to this subsection, ERA shall determine for that firm: (i) the obligation for that month by determining the dollar value of the amendment, using the entitlement data for that month; or (ii) the claim for that month by determining the dollar value of the amendment, using the entitlement data for that month.

(2) Invoice adjustments. (i) All refiners shall report to DOE on Form ERA-49 for each reported category of crude oil the sum of all adjustments to the volume of crude oil receipts during the reporting period not previously reported to ERA. If a refiner has no adjustments for the reporting period, it shall file a report of zero adjustments. Reports must be received by ERA by August 15, 1981.

(ii) Refiners shall designate on the Form ERA-49 the month during the reporting period when the crude oil subject to the adjustment first was received.

(iii) For each month for which an adjustment is filed by a refiner pursuant to this subsection, ERA shall determine for that refiner: the obligation for that month by determining the dollar value of the increased number of barrels of deemed old oil, using the deemed old oil ratios and the entitlement price for that month; or the claims for that month by determining the dollar value of the decreased number of barrels of deemed old oil, using the deemed old oil ratios and the entitlement price for that month.

(3) Other claims and obligations. (i) ERA shall determine the dollar value of any other claims or obligations of any firm in any month which is not otherwise included in subsections (d)(1) or (2) of this issue by using the entitlement price and other entitlement data for that month.

(ii) To the extent that any claim or obligation determined pursuant to subsection (d)(3)(i) of this section is not applicable to a particular month in the reporting period, ERA shall prorate the amount of such claim or obligation equally among all months in the reporting period.

(e) Total calculation.—(1) ERA shall determine the net calculation for each month in the reporting period by subtracting the sum of all obligations for that month from the sum of all claims for that month.

(2) The proportional share of the net calculation for each firm for each month in the reporting period shall be determined by multiplying the net calculation by a fraction. The numerator of the fraction is equal to the crude oil runs-to-stills for that firm used to compute the Entitlements Notice for that month, and the denominator is equal to the sum of the crude oil runs-to-stills of all firms used to compute the Entitlements Notice for that month.

(3) For each firm, ERA shall determine the sum of its proportional shares of the net calculations for each month as computed pursuant to subsection (e)(2) of this section, which shall be the total calculation for that firm.

(f) Net obligations and net claims. ERA shall determine each firm's net obligation or net claim as follows:

(1) If the sum of its claims for the reporting period, minus the sum of its obligations for the reporting period, and minus its total calculation (determined pursuant to paragraph (e)) is greater than zero, it is a net claim and the firm shall be entitled to that sum of money from firms with net obligations.

(2) If the sum of its claims for the reporting period, minus the sum of its obligations for the reporting period, and minus its total calculation (determined pursuant to

paragraph (e)) is less than zero, it is a net obligation and the firm shall be required to pay that sum of money to firms with net claims.

(g) Settlement of net obligations and net claims.—(1) As soon as practicable after August 15, 1981, ERA shall publish in the Federal Register a list of the net claims or net obligation of each firm. Firms with net obligations shall complete payments of such obligations to firms with net claims within 10 days from the date of publication of the list in the Federal Register.

(2) ERA may direct firms which have not paid monies equal to their net obligations under this section to transfer money, not in excess of their net obligation, to such firms as determined by ERA.

(3) Within 20 days from the date of publication of the list of net claims and obligations, each firm with a net claim or obligation shall certify to ERA in writing that it has completed the transactions required by this section, with whom the transaction has been completed and the dollar amounts for each firm. Certifications should be addressed to:

Entitlements Program Office, Economic Regulatory Administration
20th Street Postal Station
P.O. Box 19326
Washington, D.C. 20461

(4) If a firm with a net claim does not receive any or all of its money from firms with net obligations, that firm may apply to ERA for an order establishing the amount of the deficiency. Upon issuance of the order by ERA, the firm shall be deemed to have a claim against the entitlements program pursuant to subsection (h)(1) for the amount of the deficiency.

(h) Post-clean-up claims and obligations.

(1) (i) If after issuance of the list of net obligations and net claims, the Office of Hearings and Appeals of the Department of Energy, the Federal Energy Regulatory Commission or a court of competent jurisdiction determines, in an order no longer subject to appeal, that any party is entitled to a claim against the entitlements program, firms listed on the list of net obligations and net claims issued pursuant to subsection (g) (1) shall owe the amount of the claim.

(ii) Each firm shall pay to the party receiving the order an amount equal to the claim determined pursuant to subsection (h) (1) (i) of this section multiplied by a fraction, the numerator of which is equal to the total crude oil runs-to-stills for that firm used to compute Entitlements Notices in the reporting period, and the denominator of which is the sum of the crude oil runs-to-stills for all firms used to compute Entitlements Notices in the reporting period.

(2) (i) If after issuance of the list of net obligations and net claims, the Office of Hearings and Appeals of the Department of Energy, the Federal Energy Regulatory Commission or a court of competent jurisdiction determines, in an order no longer subject to appeal, that any party has an obligation to the entitlements program, other than as a result of entitlements enforcement actions, firms listed on the list of net obligations and net claims issued pursuant to subsection (g) (1) shall be owed that obligation.

(ii) The party shall pay to each such firm an amount equal to the obligation multiplied by a fraction, the numerator of which is equal to the total crude oil runs-to-stills for that firm used to compute Entitlements Notices in the reporting period, and the denominator of which is the sum of the crude oil runs-to-stills for all firms used to compute Entitlements Notices in the reporting period.

Opposition

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No. 81-499

In the Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the appropriate standard of review in reversing the preliminary injunction entered by the district court.

2. Whether the court of appeals erred in holding that the district court abused its discretion in granting the preliminary injunction in the absence of a showing of a likelihood of irreparable harm to Mobil.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

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MOBIL OIL CORPORATION, PETITIONER

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UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 659 F.2d 150. The opinion of the district court (Pet. App. 9a-85a) is reported at 520 F. Supp. 420.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1981. The petition for a writ of certiorari was filed on September 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

STATUTES AND REGULATIONS

The pertinent provisions of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, and the relevant sections of Subpart C of the Mandatory Petroleum Allocation Regulations, 10 C.F.R. 211.61 *et seq.*, are set forth at Pet. App. 91a-93a and 95a-128a. The pertinent provisions of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. 1904 note, and Section 211.69 of the Mandatory Petroleum Allocation Regulations, 46 Fed. Reg. 36098 (1981) (to be codified at 10 C.F.R. 211.69), are set forth at pages 1a-5a and 7a-12a of the Appendix to Respondent Tosco Corporation's Memorandum in Opposition.

STATEMENT

1. This case arises out of the federal respondents' efforts to terminate the Domestic Crude Oil Allocation Program, or Entitlements Program, 10 C.F.R. 211.67 (1980), pursuant to President Reagan's decision to exempt all crude oil and refined oil products from price controls effective January 28, 1981.

The entitlements program was adopted by the Federal Energy Administration (FEA), the predecessor of the Department of Energy (DOE), for the purpose of causing all refiners to share, roughly equally, "in the benefits of price-controlled crude oil and the burdens of uncontrolled crude oil." *Pasco, Inc.* v. *FEA*, 525 F.2d 1391, 1395 (Temp. Emer. Ct. App. 1975). Under the program, a refiner was required to have one "entitlement" for each barrel of price-controlled oil it refined during a given month. All refiners initially were issued for each month a number of entitlements corresponding to their proportionate share of the price-controlled oil refined dur-

ing that month on a nationwide basis. Entitlement purchase obligations were imposed on a refiner when, on the basis of information it was required to supply to the agency, it was determined that the refiner was using more price-controlled oil as a percentage of its total crude oil refinery runs than the national average, and therefore did not have enough entitlements for all of the price-controlled oil it refined during that month. Those refiners with less price-controlled oil in their refinery runs than the national average would receive more entitlements than necessary, which they could sell to those refiners that had purchase obligations. *Cities Service Co.* v. *FEA*, 529 F.2d 1016, 1021 (Temp. Emer. Ct. App. 1975), cert. denied, 426 U.S. 947 (1976); *Pasco, Inc.* v. *FEA*, *supra*, 525 F.2d at 1395. Thus, by requiring entitlements sellers "to reduce their crude oil or product costs by the amount of the entitlement sale proceeds, and allowing a purchaser of entitlements to include the cost of entitlements in its crude oil costs," the FEA attempted to equalize roughly the benefits of access to price-controlled crude oil for all refiners. *Pasco, Inc.* v. *FEA*, *supra*, 525 F.2d at 1395.

Using the information provided by each refiner, the agency issued monthly lists setting out the entitlement purchase obligations or sales privileges of each refiner. Thus, while the FEA, and later, the DOE, administered the program, the purchase and sales of entitlements were made by the refiners directly to each other. As a class, the major integrated oil companies had far greater access to price-controlled oil than did the small, independent refiners. Accordingly, the former were more frequently the purchasers of entitlements. *Pasco, Inc.* v. *FEA*, *supra*, 525 F.2d at 1395.

Although the entitlements program operated on a monthly basis, it compensated for the refiners' disproportionate refining of price-controlled oil after the fact; each monthly entitlements notice was issued approximately two months after the month about which it reported (10 C.F.R. 211.67(b)(1)(i)). Accordingly, Exec. Order No. 12287, 46 Fed. Reg. 9909 (1981), which provided for the "immediate and orderly decontrol of crude oil and refined petroleum products * * *," also provided (*ibid.*) for "the promulgation of entitlements notices for periods prior to [January 28, 1981]." The Executive Order also provided for "the establishment of a mechanism for entitlements adjustments for periods prior to [January 28, 1981]" (*ibid.*).

Before DOE was able to issue the entitlements notice with respect to the first 27 days of January (the January notice),[1] however, several refiners instituted lawsuits seeking to avoid obligations, or to receive additional benefits, under the entitlements program. Each of the refiners argued that, in one way or another, the termination of the entitlements program would cause it irreparable injury.

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[1] In our memorandum in opposition to Mobil's application for a stay of the mandate of the Temporary Emergency Court of Appeals pending the filing and disposition of its petition for a writ of certiorari, we referred to this notice by the name of the month in which it should have been issued, that is, as the "March notice." For the sake of consistency with the petition and the several *amicus curiae* briefs, in this filing we refer to entitlements notices by the month about which they reported, rather than by the month in which they were (or should have been) issued.

The entitlements notice that reported the entitlement purchase obligations and sale privileges for December 1980 (the December notice) was issued on February 20, 1981. See 46 Fed. Reg. 36092 (1981).

In order to alleviate that concern, and to bring the entitlements program to an orderly conclusion while endeavoring to protect the rights of the participants in the program, the DOE, on July 9, 1981, promulgated the mechanism contemplated by Exec. Order No. 12287 "for entitlements adjustments for periods prior to [January 28, 1981]." 46 Fed. Reg. 36092 (1981). The regulation (to be codified at 10 C.F.R. 211.69) provides for the issuance of a clean-up list as soon as practicable after August 15, 1981. The list is to identify entitlement purchase or sales obligations that result from adjustments or amendments to previously erroneous monthly reports for the period October 1, 1980, through January 27, 1981, and from decisions by the DOE Office of Hearings and Appeals, the Federal Energy Regulatory Commission and the courts that are rendered prior to the issuance of the clean-up list. 46 Fed. Reg. 36092-36093 (1981). The regulation also provides a mechanism for implementing administrative and judicial decisions establishing entitlements obligations or rights rendered after issuance of the clean-up list. Where, subsequent to the issuance of the clean-up list, a refiner is administratively or judicially determined to be owed money, the obligations of the other refiners to it will be determined according to a formula based on obligations set forth in the clean-up list. *Id.* at 36095-36097.

Based on DOE's announcement of its intent to promulgate the clean-up mechanism, most of the motions seeking to enjoin the issuance of the January notice were denied.[2] The restraining orders

[2] A few injunctions afforded relief to individual refiners in the form of, *e.g.*, escrow accounts. *Asamera* v. *DOE*, No. 80-1800 (D. Colo. Jan. 22, 1981); *Southland* v. *DOE*, C.A. No. J81-0170(C) (D. Miss. May 12, 1981); *Kern County Refining*

and injunctions that initially enjoined issuance of the January notice have since been dissolved.[3] Indeed, of nearly 20 actions seeking some form of preliminary injunctive relief, the relief granted by the district court in this case is currently the only injunction restraining DOE from issuing the January entitlements list.[4] The cumulative effect of these

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v. *DOE*, No. CV81-4342-MPG (C.D. Cal. Sept. 9, 1981); *Little America Refining Co. (LARCO)* v. *DOE*, No. C81-0263B (D. Wyo. Sept. 27, 1981), pending on appeal and petition for mandamus, Nos. 10-40, and 10-41 (Temp. Emer. Ct. App., filed Sept. 25, 1981).

[3] *Energy Cooperative, Inc.* v. *DOE*, No. H81-75 (N.D. Ind. Feb. 21, 1981) (dismissed for failure to exhaust administrative remedies); *Winston Refining Co.* v. *DOE*, 4 Energy Mngm't (CCH) ¶ 26,311 (M.D.N.C. Apr. 13, 1981) (preliminary injunction vacated); *Consumer Power Co.* v. *DOE*, 4 Energy Mngm't (CCH) ¶ 26,297 (E.D. Mich. Apr. 24, 1981) (preliminary injunction denied); *Diamond Shamrock Corp.* v. *Edwards*, 4 Energy Mngm't (CCH) ¶ 26,295 (D. Del. Apr. 7, 1981) (preliminary injunction denied); *Howell Corp.* v. *DOE*, 4 Energy Mngm't (CCH) ¶ 26,296 (S.D. Tex. Apr. 22, 1981) (preliminary injunction denied); *Texas City Refining Co.* v. *DOE*, No. CA G-81-113 (S.D. Tex. Apr. 24, 1981) (temporary restraining order denied); *Gulf Oil Corp.* v. *DOE*, 4 Energy Mngm't (CCH) ¶ 26,299 (D.D.C. May 14, 1981) (preliminary injunction denied); *Indiana Farm Bureau Cooperative Association* v. *DOE*, 4 Energy Mngm't (CCH) ¶ 26,315 (S.D. Ind. June 8, 1981) (preliminary injunction denied); *Oklahoma Refining Co.* v. *DOE*, No. 81-525-E (W.D. Okla. Aug. 19, 1981) (preliminary injunction dissolved); *Huntway Refining* v. *DOE*, No. CV 81-437-FW (C.D. Cal. Aug. 26, 1981) (temporary restraining order denied); *Newhall Refining Co.* v. *DOE*, No. 81-396 (D. Del. Sept. 18, 1981) (preliminary injunction denied and complaint dismissed), appeal filed, No. 3-29 (Temp. Emer. Ct. App. Oct. 19, 1981).

[4] The preliminary injunction issued by the district court in *LARCO* v. *DOE*, *supra*, enjoined DOE from issuing any

various actions, however, has been to delay the issuance of the January notice for more than seven months. This delay has deprived some refiners of the use of the funds they should have received from the program and has enriched those refiners that should have paid out money by the interest-free use of that money for a substantial period of time.

2. Mobil filed this action in the United States District Court for the Northern District of New York on April 10, 1981, alleging that unknown refiners and resellers of oil had engaged in manipulative practices that had the effect of keeping price-controlled oil out of the entitlements program to Mobil's detriment. Mobil claimed that DOE had a duty to take action but nevertheless failed to account for this alleged "disappearance" of price-controlled oil. Mobil further alleged that this asserted failure by DOE rendered illegal its entitlements notices. Mobil requested the district court to declare DOE's post-decontrol entitlements notices unlawful and to enjoin the issuance of any additional notices until DOE took action to ensure that such notices would take into account every barrel of price controlled oil produced from November 1974 until the date of decontrol.

The district court concluded that Mobil had demonstrated "probable success on the merits" and "possible irreparable injury," and it therefore entered a preliminary injunction restraining DOE from issuing any further entitlements notices without first

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further entitlements list that did not "order that entitlements with a value of $51,306,275 be sold by [LARCO] to implement any exception relief that may ultimately be granted to [LARCO] as a result of administrative and judicial proceedings now pending before [DOE] * * *."

accounting for all of the price-controlled crude oil that had been produced and sold since the beginning of the entitlements program in 1974. The court's conclusion that petitioner was likely to succeed on the merits was based on its determination (Pet. App. 73a-75a) that the asserted failure of DOE to account for all price-controlled oil in the entitlements program violated both DOE's statutory authority and Exec. Order No. 12287. The court's finding that Mobil would suffer irreparable harm, absent an injunction, depended on its conclusion (*id.* at 77a-80a) that neither it nor DOE could assure Mobil that Mobil would be reimbursed for its entitlement expenditures were it ultimately to prevail on the merits. The court also concluded that the harm resulting to Mobil from the issuance of additional entitlements notices outweighed the harm that an injunction would cause refiners that depend on receipts from the sale of entitlements (*id.* at 80a-81a). While the court recognized (*id.* at 80a-81a) that the injunction "temporarily inconvenienced" some sellers of entitlements, it held (*id.* at 81a) that "their purported right to continue to benefit from an apparently mismanaged government program must be junior to the right of those refiners such as Mobil, who also seek to claim the same benefit, by restoration of the program to its original intention." Finally, the court determined that the only possible "harm" that would accrue to DOE as a result of an injunction would be a requirement that it "act in accordance with the original intention of the entitlements program and the EPAA" (*id.* at 80a). Pursuant to 28 U.S.C. 1292(b), the district court certified its order to the Temporary Emergency Court of Appels (TECA).

3. TECA reversed. The court of appeals found it unnecessary to review the merits of Mobil's conten-

tions because it held (Pet. App. 4a) that "Mobil ha[d] failed to make a clear showing that it will suffer irreparable harm if an injunction does not issue." TECA, which, unlike the district court, had before it the final rule providing for the clean-up mechanism, held that Mobil had not demonstrated that it would be precluded from recovery if it were ultimately to prevail on its claims. The court of appeals first noted (*ibid.*) that "[t]he standard for determining whether a party has shown irreparable injury is founded upon the court's ability to ultimately grant an effective remedy." Then, applying the well-established doctrine (*ibid.*) that "[t]emporary loss of income, recoverable upon successful termination of the litigation, will not usually constitute irreparable injury," the court concluded (Pet. App. 5a) that there were available to Mobil "at least three avenues of administrative relief."

The first such remedy on which the court of appeals relied (Pet. App. 5a) was Mobil's February 10, 1981 petition to DOE's Economic Regulatory Administration to institute rulemaking proceedings to amend the entitlements regulations to account for all price-controlled crude oil, which petition is still pending. Second, the court noted (*ibid.*) that Mobil had filed an appeal of its entitlements obligations with DOE's Office of Hearings and Appeals, and that the July 8, 1981 decision of that Office that it lacked jurisdiction to hear the appeal is a final order subject to judicial review. Finally, TECA recognized (*ibid.*) that DOE has adopted a regulation providing "for a final 'clean-up' list * * * and for a self-executing mechanism intended to account for judicial and administrative determinations made after * * * August 15, 1981 * * *." This mechanism is now available to imple-

ment any increase or decrease in entitlements found to be due Mobil from prior periods as a result of the resolution of the "disappearing" old oil issue or any other issue pending before DOE or the courts. In fact, by its September 30, 1981 motion for leave to amend, and subsequent amendment of, the complaint in this case, Mobil already has sought judicial review of the regulation, of DOE's failure to date to grant Mobil's petition for rulemaking and of the Office of Hearings and Appeals' July 8, 1981 ruling.

The court of appeals concluded as follows (Pet. App. 5a-6a):

> Thus it is clear at this writing that Mobil has remedies which will give it an opportunity to have its claims reviewed and adjudicated. There is no conceivable reason why established and orderly procedures should be bypassed. Furthermore, the nature of the claim and the proof are more appropriately considered in the first instance by the administrative agency.

ARGUMENT

Petitioner has attempted to portray the questions presented by this case as issues of law—*i.e.*, what is the appropriate standard for appellate review of a grant or denial of a preliminary injunction and what standard must a party satisfy to obtain a preliminary injunction in the first instance. In fact, however, both of those standards are well settled, and the petition presents merely the questions whether they were properly applied to the unique facts of the present case. The court of appeals applied those standards correctly and in a way that conflicts with the decision of no other court. Moreover, because the

Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 751 *et seq.*, which provided the statutory authority for the entitlements program, expired on September 30, 1981, any decision this Court might render would be of scant precedential value.[5]

1a. It is well established that appellate review of a grant or denial of preliminary injunctive relief is limited to the abuse of discretion standard. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975); *Rittmiller* v. *Blex Oil, Inc.*, 624 F.2d 857, 859 (8th Cir. 1980); *McGuire Shaft & Tunnel Corp.* v. *Local Union No. 1791, UMW*, 475 F.2d 1209, 1215-1216 (TECA), cert. denied, 412 U.S. 958 (1973). The phrase "abuse of discretion," however, is not a talisman; its absence from a court's opinion does not render an otherwise proper decision invalid.

In *Sampson* v. *Murray*, 415 U.S. 61 (1974), on which TECA relied (Pet. App. 4a), this Court reversed the trial court's finding of irreparable injury because of the existence of legal remedies available to the plaintiff in that case. The Court's opinion (415 U.S. at 88-92), like TECA's (Pet. App. 4a), discusses in detail what constitutes irreparable injury. Although the phrase "abuse of discretion" nowhere appears in its opinion, the Court held that a preliminary injunction prohibiting discharge of the plaintiff from government employment should not have been issued, because the employee could not show

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[5] The Act's savings clause, 15 U.S.C. 760g, however, provides that the expiration date "shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date."

irreparable injury in light of the adequate remedy available to compensate her for lost earnings in the event she eventually prevailed on the merits. Similarly, TECA's findings (Pet. App. 5a; emphasis added) that "*it is clear* at this writing that Mobil has remedies which will give it an opportunity to have its claims reviewed and adjudicated" and that "there is *no conceivable reason* why established and orderly procedures should be bypassed" plainly show that the court of appeals regarded the district court's grant of a preliminary injunction as an abuse of its discretion.[6]

b. Moreover, the court of appeals correctly concluded that the district court abused its discretion in granting the preliminary injunction because Mobil had not demonstrated a likelihood of irreparable harm.

To begin with, the district court failed to examine the sufficiency of the then proposed clean-up mechanism, except to note (Pet. App. 79a) that it did not specifically amend the entitlements program to "rem-

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[6] Mobil's attempt (Pet. 17 n.11) to distinguish *Sampson* v. *Murray, supra*, from this case is unavailing. In *Sampson*, this Court found that a specific statute permitted the remedy in question (415 U.S. at 90-91), while here TECA found that a DOE regulation provided for one of the remedies available to Mobil, the clean-up mechanism (Pet. App. 5a).

In addition, this Court's grant of the petition for a writ of certiorari in *United Steelworkers of America* v. *Swint*, No. 80-1193 (Apr. 20, 1981), is inapposite. In that case, the Court is presented with a question concerning whether the court of appeals was bound by the "clearly erroneous" standard in reviewing a district court's findings of fact. This case involves no disputed material facts. Here, by contrast, the parties agree that the abuse of discretion standard applies and, as we have shown above, the court of appeals neither purported to, nor did, deviate from that standard.

edy the burden" imposed on refiners as a result of the alleged manipulatory practices. As TECA recognized (*id.* at 5a), however, the clean-up mechanism was intended to implement court-ordered relief, presumably including a final judgment in this case, as well as agency action. See 46 Fed. Reg. 36093 (1981).[7]

Beyond this, the district court's assertion (Pet. App. 77a) that "it is virtually impossible * * * for [Mobil] to be afforded any meaningful protection from the loss of approximately $50 million it would be illegally obligated for under the DOE's January notice" ignores the general rule that courts and agencies may require the repayment of funds received under agency actions later determined to be erroneous. *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229-230 (1965); *Howell Corp.* v. *DOE*, 4 Energy Mngm't (CCH) ¶ 26,296 (S.D. Tex. Apr. 22, 1981).[8]

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[7] The difference between the proposed clean-up mechanism, which was before the district court, and the final form of the mechanism, which TECA reviewed, is that the final regulations specifically provide that each participant in the entitlements program is legally obligated for a mathematically determinable portion of any judicial or administrative decision adjusting the entitlements claims or obligations of any other participant. 46 Fed. Reg. 36095-36097 (1981). In view of the need to expedite its disposition of the present case, TECA properly took into account the final version of the clean-up mechanism, which had not been before the district court. Cf. *Watts, Watts & Co.* v. *Unione Austriaca Di Navigazione*, 248 U.S. 9, 21 (1918); *Warm Spring Dam Task Force* v. *Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980).

[8] Indeed, the court in *Howell Corp.* v. *DOE*, *supra*, specifically held that the authority to require refunds precluded a finding that issuance of the January entitlements list would constitute irreparable harm. See also *Marathon Oil Co.* v. *DOE*, 482 F. Supp. 651, 659-660 (D.D.C. 1979).

2. Contrary to Mobil's allegation (Pet. 11) of "disagreement and confusion" among the courts of appeals concerning the standard for issuance of a preliminary injunction, the circuits are in substantial agreement; while the language employed by the courts sometimes may differ, the basic prerequisite of a showing of irreparable injury for preliminary injunctive relief is well settled and uniformly applied.[9]

Mobil contends (Pet. 12) that TECA reversed the district court's entry of a preliminary injunction because Mobil failed to show that "irreparable injury will inevitably occur in the absence of interlocutory relief." Moreover, petitioner argues (Pet. 11) that such a strict standard "is in conflict with the rules established by at least the Second, Ninth, and District of Columbia Circuits." TECA, however, neither enunciated nor applied the stringent requirement for preliminary injunctive relief attributed to it by Mobil. Rather, TECA rejected, as the basis for a preliminary injunction, Mobil's speculative predictions of the harm it might suffer in the absence of such an injunction. In so doing, TECA followed the teachings of this Court and the other courts of appeals, which, as we

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[9] Although Mobil apparently is primarily concerned with the requirement of showing a likelihood of irreparable harm (Pet. 11-20), the law review article on which Mobil relies (Pet. 13) is addressed to the overall standard for the issuance of preliminary injunctive relief, of which irreparable harm is only one factor. Moreover, contrary to the opinion of the one commentator cited by Mobil, that overall standard is well settled black letter law. See, *e.g.*, 7 *Moore's Federal Practice* ¶ 65.04[1] (2d ed. 1980); 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2948 (1973 ed.). Indeed, if the standard for the issuance of such a frequently requested form of relief were the subject of as much controversy as Mobil represents, we submit that the problem would have come to the Court's attention long before now.

show below, require the same showing of a likelihood of irreparable injury that TECA required here.

First, Mobil suggests (Pet. 12) that the Second Circuit requires a lesser showing of irreparable injury than that demanded by the court below on the basis of the statement in *Charlie's Girls, Inc.* v. *Revlon, Inc.*, 483 F.2d 953, 954 (1973) (per curiam), that "[o]ne moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." In that very case, however, the Second Circuit reversed the entry of a preliminary injunction on the same analysis as that employed by TECA; having found no irreparable harm, it saw no need to, and did not, "express or intimate any views on 'the probability of success' of appellee at trial * * *" (*ibid.*). Moreover, Mobil ignores the Second Circuit's subsequent opinion in *Triebwasser & Katz* v. *American Telephone & Telegraph Co.*, 535 F.2d 1356 (1976), on which TECA expressly relied (Pet. App. 4a) and which specifically states (535 F.2d at 1359; emphasis added; citations omitted) that the second prong of this test

> does not eliminate the basic obligation of the plaintiff to make a *clear showing* of the threat of irreparable harm. That is a fundamental and traditional requirement of all preliminary injunctive relief, * * * since equity cannot intervene where there is an adequate remedy at law. * * * In sum, the balancing of hardships test * * * necessarily includes the *showing of irreparable harm.*

Similarly, in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d

841 (1977), on which Mobil also relies (Pet. 12), the District of Columbia Circuit stated (559 F.2d at 844; emphasis added) that "[a]n order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order *would inflict* irreparable injury on the movant." This is the same standard that TECA has consistently employed, in virtually identical language and relying on the same authority. See, *e.g.*, *Pacific Coast Meat Jobbers Association, Inc.* v. *Cost of Living Council*, 481 F.2d 1388, 1390 (1973); *McGuire Shaft & Tunnel Corp.* v. *Local Union No. 1791, UMW*, 475 F.2d 1209, 1216, cert. denied, 412 U.S. 958 (1973). Indeed, this Court also has employed substantially identical language: "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he *will suffer* irreparable injury * * *." *Doran* v. *Salem Inn, Inc.*, *supra*, 422 U.S. at 931 (emphasis added); accord, *Sampson* v. *Murray*, *supra*, 415 U.S. at 88-90.

Mobil's reliance (Pet. 12) on *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 634 F.2d 1197 (1980), also is misplaced. In that case the Ninth Circuit applied (*id.* at 1201) a test identical to that announced in *Charlie's Girls, Inc.* v. *Revlon, Inc.*, *supra*, but reversed the district court's grant of a preliminary injunction because the plaintiff, like Mobil, had shown only "the threat of lost revenues." 634 F.2d at 1202. The court stated (*ibid.*; emphasis in original):

> Even if some significant threat of injury be hypothesized, it was neither found nor shown to be *irreparable*. The basis of injunctive relief

> in the federal courts is irreparable harm and inadequacy of legal remedies. *Sampson* v. *Murray*, [*supra*].[10]

While the semantic formulations employed by the courts (even among panels within the same circuit) occasionally may vary, none of them, including TECA in this case, has adopted the "straw man" standard that Mobil has attributed to TECA (Pet. 12): that a preliminary injunction will issue only upon a showing that "irreparable injury will inevitably occur in the absence of interlocutory relief." Nor, to be sure, has any court adopted Mobil's analysis, pursuant to which virtually every litigant would be entitled to preliminary injunctive relief, since every party litigates in the face of *some* possibility that an adverse party might become bankrupt, might disappear or might successfully secrete its assets. TECA's reversal of the district court's entry of a preliminary injunction thus simply comports with the precedents of this Court and the other courts of appeals to the effect that economic injury, recoverable upon the termination of litigation, is not irreparable. TECA merely found, based on the particular facts of this case and its expertise under the EPAA, that there was no reasonable likelihood that Mobil would suffer irreparable injury in the absence of the drastic remedy of a preliminary in-

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[10] See also *Lundgrin* v. *Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) (emphasis added) ("the moving party must establish * * * a showing that the movant *will suffer* irreparable injury unless the injunction issues"); *Fox Valley Harvestore, Inc.* v. *A.O. Smith Harvestore Products, Inc.*, 545 F.2d 1096, 1097 (7th Cir. 1976) (emphasis added) (plaintiffs must show that they *"will be* irreparably harmed if the injunction does not issue * * *").

junction. Further review by this Court therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner's Reply Brief

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No. 81-499

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

MOBIL OIL CORPORATION,
Petitioner,
v.

UNITED STATES DEPARTMENT OF ENERGY,
JAMES B. EDWARDS, SECRETARY OF ENERGY,
and TOSCO CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Temporary Emergency Court of Appeals

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF [1]

1. The government's Opposition appears to rest exclusively on the claim that the court of appeals held that DOE's "clean-up" regulations provide a means for Mobil to obtain relief in the event that it ultimately prevails on the merits. Opposition at 9-10, 12 n. 6, 13. On this basis the government attempts to negate the conflict among the courts of appeals and to mask the continuing refusal of the Department of Energy to address is misadministration of the entitlements program. However, that claim is baseless. Not only did the court not consider the effectiveness or validity of the regulations, it was DOE that successfully contrived to keep the court from considering those matters.

DOE waited until July 9, after oral argument in the court of appeals, to issue the clean-up regulations, thus avoiding briefing and argument on them in the normal course. On July 9 DOE sent the court of appeals the new regulations, with a letter asserting that the regulations "provide[] a remedy that makes the granting of injunctive relief inappropriate", and urged the court of appeals, under its rules, to refuse post-argument briefs. Mobil's July 12 letter outlined Mobil's objections to the new regulations and asked that the court permit briefing. The court did not do so. Instead, it advised Mobil to "appeal" the regulations administratively as the third of the three "avenues of administrative relief" it offered.

It is obvious from these facts, and from other indications in its opinion, that the court was neither approving the clean-up regulations nor finding that they were a satisfactory remedy. The court would hardly have advised Mobil to raise its arguments in an "administrative appeal" of the regulations if it was simultaneously rejecting those arguments and upholding the regulations as a suitable remedy. In that case the "administrative

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[1] The list of parent companies, subsidiaries, and affiliates required by Rule 28.1 was included as the Supplemental Appendix to the Petition.

appeal" would be *res judicata*, a predetermined waste of time. Moreover, if it had so found, the court would not have needed—or bothered—to place that holding third and to precede it with two "avenues of administrative relief" that are highly doubtful and depend on DOE's voluntarily changing its consistent course of refusing to deal with Mobil's allegations.

Finally, the government forgets that the court of appeals criticized DOE sharply for its inaction, expressed the "hope" that DOE would "expeditiously dispose[]" of the matter, and quoted favorably from the June 8, 1981, opinion of DOE's Office of Hearings and Appeals: "'. . . we believe it incumbent upon [DOE] to attempt to exercise its broad rulemaking discretion. . . .'" App. 7a. None of this is consistent with the government's argument to this Court that the court of appeals was satisfied with, or endorsed in any way, the clean-up mechanism that the government now asserts was approved by the court of appeals.

Thus, the court of appeals held that Mobil was not entitled to a preliminary injunction even though it effectively recognized that Mobil had, and has, no existing means to obtain relief. The court, vacating the injunction, stated its "hope" that DOE would act to provide a remedy.

2. In view of the nature of its holding, it was particularly wrong for the court of appeals to have utterly ignored both the district court's opinion and this Court's long-standing insistence that a court of appeals defer to the district court's decision on preliminary relief unless it amounts to an abuse of discretion. This is especially true here since the behavior of DOE both before and after the court of appeals' decision confirms that the district court's assessments of DOE's motives and action (or inaction) were entirely correct.

The district court found that starting in April 1977 Mobil had been calling the DOE's attention to "regula-

tory loopholes" caused by DOE's mismanagement of its entitlements program. Those loopholes permitted some refiners to manipulate their inventories to cause massive amounts of price-controlled crude oil to disappear from the program; those actions have cost refiners and the consuming public $5.6 billion, have already cost Mobil $284 million, and will cost it another $50 million if the final entitlements list issues. The district court held that DOE had conducted internal studies that had confirmed Mobil's allegations. Moreover, the court held, DOE had never acted on those allegations because it did not want to face up to and rectify the enormous mismanagement of its program that it had permitted. To continue to hide these facts, the court found, DOE had "misstate[d] the record" and sought to "obfuscate the issues". It held that DOE's argument that it was as yet unprepared to deal with these problems was "not entirely truthful." (Pet. App. 39a, 49a, 53a, 54a). None of these findings has ever been controverted by DOE. On such a record, the district court found that if Mobil were left to pursue DOE's inchoate administrative proceedings,

> . . . the DOE would probably continue to unfairly claim that it must be advanced additional time to investigate these problems. In short, this additional time would have the practical effect of insulating the DOE from judicial scrutiny.

Pet. App. 55a.

During appeal DOE took further steps to prevent any exposure of its deficiencies. In Mobil's administrative appeal of the December entitlements notice, with a record including most of the documentation that had been before the district court, the Department's quasi-independent Office of Hearings and Appeals rejected DOE's claim that OHA lacked jurisdiction and entered a Proposed Interlocutory Order generally agreeing with Mobil's allegations. In that order the OHA proposed to commence a thorough investigation by requiring all refiners to supply information to reveal the identity of inventory manipulators and the scope of their actions.

To put it mildly, DOE did not embrace that proceeding as the means to deal with the problems raised by Mobil. Rather, DOE's Office of General Counsel appeared before OHA not only rearguing that OHA had no jurisdiction over the problem but now also threatening recourse to the Secretary if OHA thought otherwise. Attachment 2 to Tosco's letter to the Clerk of September 4, 1981 (No. A-192) at 2. The DOE Office of General Counsel also stated flatly to OHA that DOE would do nothing about the problems Mobil had brought to its attention:

> [T]he President doesn't want us to go around trying to make equity and try to figure out and undo all that windfall that resellers and producers and some refiners got in the normal course of business.

Id. at 4.

Three weeks later (and after oral argument in the court of appeals), on July 8, the Office of Hearings and Appeals announced that it was abandoning its proposed investigation because it had become convinced that it did lack jurisdiction after all.[2] It issued the order denying Mobil's appeal that was extensively quoted by the court of appeals, Pet. App. 6a-7a. Thus, the DOE succeeded, by highly questionable means, in stopping the OHA's investigation, and once more prevented any development of the facts underlying its own misfeasance and the identity of those refiners who have benefitted by it at the expense of Mobil and other refiners, large and small.

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[2] The Office of Hearings and Appeals is not a creature of statute or regulation, but of delegation. Its Director serves at the pleasure of the Secretary and has none of the protections of tenure or institutional independence of an Administrative Law Judge under the Administrative Procedure Act, 5 U.S.C. §§ 556(b)(3), 3105. The DOE does not regard the Administrative Procedure Act as applying to OHA proceedings, and OHA's regulations governing appeals do not bar *ex parte* communications. Compare 10 CFR § 205.100-205.109 with §§ 205.50, 205.69E.

In its decision, the court of appeals adopted OHA's language excoriating DOE for its inaction:

> ". . . we are particularly disturbed that such a dispute exists nearly one-half year after decontrol. . . . [DOE] apparently lacks knowledge of the degree to which upstream stockpiling of crude oil and use of time exchanges increased towards the end of the program as Mobil alleges. Moreover, as far as we know, [DOE] has shown no inclination to obtain such knowledge. . . .
>
> • • • •
>
> ". . . we believe it incumbent upon [DOE] to attempt to exercise its broad rulemaking discretion. . . ."

(App. 6a-7a). The court of appeals thus itself recognized the pertinence of the considerations about DOE's motives and intentions tha thad formed the basis for the district court's decision. Particularly in this light, it was error for the court of appeals to ignore the district court's decision and to approach the case as though it had not been heard by a lower court.

We note finally that the government's Opposition strongly indicates that this inaction will continue. Mobil's February 11, 1981, petition for emergency rulemaking is merely reported by the government as "still pending" (Opposition at 9), now ten months after decontrol. No doubt it will never be acted upon. DOE has not changed its position with respect to the lack of jurisdiction of the Office of Hearings and Appeals, and of course does not suggest that Mobil might prevail in litigation challenging DOE's internal delegation of jurisdiction. See Petition at 18. Mobil did write the Secretary of Energy in September stating its desire to appeal the clean-up regulations (see Petition at 19 n. 13); on November 17, DOE replied only that it will "persevere in [its] efforts to select and follow that course which most clearly carries

out the public interest." No specifics of any kind were even suggested.[3]

Thus, the Opposition reflects that the DOE has not at all altered its position of failure and refusal to take any step to provide or pursue the "avenues of administrative relief" that the court of appeals thought might provide a remedy for Mobil. It, therefore, is clear not only that without the preliminary injunction Mobil has no means of obtaining relief should it prevail on the merits, but also that DOE, contrary to the hope of the court of appeals, has no intention of providing one.

3. The government is also incorrect in characterizing the court of appeals' holding on the stringency of the requirement to show irreparable injury to obtain a preliminary injunction.

The government asserts (Opposition at 17) that the court of appeals "merely found" that the injunction should be vacated because there was no "reasonable likelihood" of irreparable injury. This, however, is a wishful fabrication. No such phrase appears in the court's opinion. Rather (as the government is forced to recognize at page 9 of its Opposition), the court actually required a showing that preliminary relief must be denied unless a movant can show that without such relief it would be "precluded from" (i.e., would have no chance of) recovery. No doubt the government created the phrase "reasonable likelihood" attempting to make the court's holding appear less harsh and less in conflict with other

[3] Before the court of appeals, Mobil expressed its concern that the expiration of DOE's statutory authority on September 30, 1981, might make any further administrative action impossible. 15 U.S.C. § 706g. The court of appeals refused to deal with the issue. Pet. App. 6a. Thus, it specifically preserved the possibility that the remedies it offered might be meaningless. DOE has taken no step since September 30 that is inconsistent with the view that it is now powerless to provide any change to its clean-up regulations or to take any other step suggested as possible by the court of appeals.

courts' more flexible standards. That the government felt compelled to make that attempt is, of course, quite significant.

4. The government concedes that there is inconsistency among the courts of appeals, and even among panels of individual circuits, in formulations of the appropriate standard for preliminary injunctions. Opposition at 14, 17. But, the government argues, those courts all actually apply the same standard even if they do not say so. *Id.* at 14. This is a seriously flawed assertion.

We first note that it is hardly likely that a court of appeals would announce one rationale in the text of an opinion and apply another in reaching the result. Moreover, the government's conclusion that actual results are not affected by the variance among announced standards is demonstrably wrong. For example, in *Aleknagic Natives Ltd.* v. *Andrus*, 648 F.2d 496 (9th Cir. 1980), rehearing denied, *id.* at 505 (1981), the Ninth Circuit, in reversing a district court denial of a preliminary injunction, stressed the variability from case to case of the quantum of proof of irreparable injury that is necessary. *Id.* at 502. It held that the plaintiff had made a strong showing on likelihood of success on the merits and the defendant had not shown substantial injury if preliminary relief were granted. Accordingly, it concluded that the district court should have accepted a weaker showing on possibility of irreparable injury. The Ninth Circuit specifically held that the preliminary injunction should be granted even though "there remains some uncertainty as to the hardship likely to occur [to the plaintiff] if the preliminary injunction is not granted" and "the potential harm to the plaintiffs. . . may not be substantial." *Id.* at 504. Similarly, in *Blackwelder Furniture Co.* v. *Selig Manufacturing Co.*, 550 F.2d 198 (4th Cir. 1977), the Fourth Circuit, in reversing a denial of preliminary relief, stressed that

> [W]hile "irreparability" may suggest some minimum of probable injury which is required to get the court's

> attention, the more important question is the *relative* quantum and quality of plaintiff's likely harm.

Id. at 196 (emphasis in original). The court then held that because the plaintiff was likely to succeeed on the merits and the defendant would not be injured by a preliminary injunction, the court would require much less of a showing of irreparable injury. *Id.* at 196-197.

Highly illuminating are two cases involving substantially identical facts that two circuits decided differently because one had a more stringent standard for preliminary relief. Compare *Modern Controls, Inc* v. *Andreakis*, 578 F.2d 1264 (8th Cir. 1978) with *Continental Group, Inc.* v. *Amoco Chemical Corp.*, 614 F.2d 351 (3d Cir. 1980). In both cases, employers sought preliminary relief against former employees who had gone to work for competitors; in both cases, the former employees swore that they would not supply their former employers' trade secrets to their new employers; and in both cases the former employers asserted that preliminary relief should nonetheless be granted because such transmission of secrets might occur inadvertently. The Eighth Circuit was willing to assume that this possibility would occur. 578 F.2d at 1270. However, the Third Circuit held the same evidence did not satisfy its standard for irreparable injury because:

> Risk of harm if information is inadvertently disclosed . . . is not sufficient. . . . There must be an imminent threat of the allegedly harmful disclosure.

614 F.2d at 358-359.

It thus appears that the Third Circuit would not have decided *Modern Controls* as did the Eighth, because of its much stricter standard for preliminary relief. The Third Circuit also held that the district court had erred in accepting a lesser showing of irreparable injury because of a finding that the defendant would not be injured by a preliminary injunction. *Id.* at 358. Thus, it is very difficult to imagine the standard of the Third

Circuit or that of the court of appeals in the present case leading to the results announced by the Ninth and Fourth Circuits in *Aleknagic* and *Blackwelder*.[4]

The government also ignores a deeper problem. It is the district courts that grant and deny motions for preliminary relief on a day-to-day basis. Appellate opinions are written to provide guidance to those courts. It must be assumed that differing formulations by appellate courts will produce differing results in the district courts. However, those results are largely invisible to the courts of appeals and to this Court, since most district court decisions are not appealed, and the scope of review of those that are appealed should be the very narrow, abuse-of-discretion standard. Thus, the actual formulations employed by the district courts, and their application to the facts of specific cases, rarely come before an appellate tribunal. Accordingly, it is particularly important that the standard for consideration of preliminary injunction motions provide clear and uniform guidance. The formulation of that standard should not, as the government concedes it now does, vary not only among the circuits but within panels of individual circuits. Only this Court can bring about that uniformity.[5]

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[4] The government fails in its attempt to rationalize away the disagreement among the courts of appeals. The Second Circuit does require a lesser showing of irreparable injury than did the court of appeals here. Its holding in Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (1973) (per curiam) was that the movant's interest would "in no way be affected" by the absence of preliminary relief. Thus, the movant had made no showing at all on that point. Similarly, in Treibwasser & Katz v. American Telephone and Telegraph Co., 535 F.2d 1356, 1959 (2d Cir. 1976), the Second Circuit held that the movant need only show the "threat" of irreparable harm, not, as in the present case, that the movant must show that irreparable injury will inevitably arise if preliminary relief is denied. Sampson v. Murray, 415 U.S. 61 (1974) and the result in Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197 (9th Cir. 1980) are similar, since in both cases it was held that there was a definite means of recovery of money in the event that the movant succeeded on the merits. Here, by contrast, even assuming Mobil prevails on the merits there

CONCLUSION

For these reasons, as well as those stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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is now no way for Mobil to obtain the funds that Mobil has wrongly been forced to pay from refiners who have them.

[5] Tosco's Opposition argues that the district court's preliminary injunction violates the limitation on the district court's power to grant relief imposed by section 211(e) of the Economic Stabilization Act, 12 U.S.C. § 1904 note. The court of appeals did not rely on that point, nor does the government's Opposition raise it. Tosco's argument is also incorrect, as it simply ignores § 211(d)(2), which permits the district courts to grant any preliminary relief necessary to protect the party seeking relief, to which provision the subsection (e) restriction is expressly subjected. See S. Rep. No. 92-507, 92d Cong., 1st Sess., 1971 U.S. Code Cong. & Admin. News 2283, 2293. Subsection (e) was merely intended to protect the consuming district courts from breaks in the program of controls by preventing district courts from unnecessarily bringing the entire regulatory program to a halt. Economic Stabilization Legislation: Hearings on S. 2712 before the Senate Committee on Banking, 92d Cong., 1st Sess. (1971) at 19-20; and remarks of Senator Tower, 117 Cong. Rec. S. 19815-6 (daily ed. Nov. 30, 1971). Moreover, that consideration is now moot, since the program has not been affecting the public since the Executive Order of Decontrol on January 28, 1981.

Amicus Brief

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No. 81-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, JAMES B. EDWARDS, SECRETARY OF ENERGY AND TOSCO CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF ASHLAND OIL, INC. AS *AMICUS CURIAE*

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF ASHLAND OIL, INC. AS *AMICUS CURIAE*

Ashland Oil, Inc. ("Ashland") respectfully submits this brief as an *amicus curiae* in support of the Petition for a Writ of Certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States in *Mobil Oil Corporation v. Department of Energy*, ___ F.2d ___ (TECA 1981) entered on August 14, 1981.

I. STATEMENT OF THE CASE

The United States District Court for the Northern District of New York granted a preliminary injunction to Mobil Oil Corporation ("Mobil") enjoining the issuance by the United States Department of Energy ("DOE") of the January, 1981 and any other Entitlements Notices. The district court made the following findings: (i) that DOE had permitted massive quantities of price-controlled crude oil to disappear from the Entitlements Program; (ii) that the disappearance of this oil defeated the purposes of the Entitlements Program; (iii) that such disappearance would compel Mobil to purchase under the enjoined Entitlements Notices millions of dollars of entitlements which Mobil would not be required to purchase but for such disappearance; and (iv) that Mobil would suffer irreparable injury from the issuance of the Entitlements Notices in question[1]. App. B at 63a-81a.

The Temporary Emergency Court of Appeals reversed, holding that preliminary relief was inappropriate because Mobil had failed to establish with certainty that irreparable harm would occur. Mobil sought, and received from Justice Brennan, a stay of mandate pending certiorari. On September 11, 1981 Mobil filed its Petition For A Writ Of Certiorari To The United States Temporary Emergency Court Of Appeals ("Petition for Certiorari").

II. INTEREST OF ASHLAND

A. Regulatory Background

Recognizing the growing differential between the controlled price of certain domestic oil (hereinafter

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1. The opinion of the Temporary Emergency Court of Appeals from which certiorari is sought and the opinion of the district court are reported in separate Appendices to the Petition for Certiorari, beginning at 1a and 9a, respectively. All references herein to "App." are to the Appendices to the Petition for Certiorari.

sometimes referred to as "old oil") and the uncontrolled price of imported foreign oil, the Federal Energy Administration ("FEA"), DOE's predecessor, adopted the Entitlements Program. 39 Fed. Reg. 42246 (Dec. 4, 1974). Refiners with greater access to the less expensive price-controlled crude oil—generally the larger, integrated refiners—had a competitive advantage over smaller refiners who were dependent on more expensive uncontrolled crude. The Entitlements Program was intended by FEA to fulfill the statutory purposes of the Emergency Petroleum Allocation Act of 1973, *as amended*, 15 U.S.C. § 751 *et seq.* (1976) ("EPAA"), *inter alia* "preservation of an economically sound and competitive petroleum industry; including the priority needs ... to preserve the competitive viability of independent refiners ...," "equitable distribution of crude oil ... at equitable prices among all ... sectors of the petroleum industry, including independent refiners ...," and "minimization of economic distortion." 15 U.S.C. § 753(b)(1)(1976). *See* 39 Fed. Reg. 31650 (Aug. 30, 1974) and 39 Fed. Reg. 39740 (Nov. 11, 1974). In particular, the Entitlements Program was intended to protect the viability of independent refiners by equalizing among all refiners the financial benefits to be derived from access to price-controlled crude oil. 39 Fed. Reg. 31650 (Aug. 30, 1974).

In lieu of physically allocating a proportionate share of such crude oil to each refiner, FEA created a system of transfer payments from refiners with greater-than-average access to price-controlled crude oil to refiners with less-than-average access to price-controlled crude oil. *Id.*, 39 Fed. Reg. 39740 (Nov. 11, 1974).

The Entitlements Program operated generally in the following manner.[2] Each refiner reported monthly to

2. The operation of the Entitlements Program is set forth in greater detail in 10 C.F.R. §§ 211.62-211.67 (1981), from which the more general description provided *infra* has been drawn.

FEA (later DOE) the number of barrels of price-controlled crude oil that it had "received" during the second preceding month and the number of barrels of oil that it had refined during that month (referred to as "runs-to-still"). From this information, FEA calculated the ratio of (i) the total barrels of price-controlled crude oil reported received by all refiners that month to (ii) the total runs-to-still (referred to as the "Domestic Oil Supply Ratio" or "DOSR"). FEA or DOE then issued to every refiner the number of entitlements equal to the monthly DOSR multiplied by the refiner's runs-to-still for that month. In essence, this calculation credits to each refiner its pro rata share of the price-controlled oil purportedly "received" by all refiners during the month.

Any refiner receiving in a given month a greater number of barrels of price-controlled crude oil than the number of entitlements issued to it by the agency was required to purchase from other refiners the number of entitlements equal to the difference between the number of such barrels received and the number of entitlements issued. A refiner receiving fewer barrels of price-controlled oil during the month than the number of entitlements issued to it by the agency was required to sell to other refiners the number of entitlements issued less the number of such barrels received.

The obligation to purchase entitlements is triggered by the "receipt" of price-controlled crude oil. DOE's definition of receipts permitted each refiner to adopt its own method of determining when crude oil had been "received." 10 C.F.R. § 211.62 (1981). Some refiners reported their receipts based on their total monthly purchases. Other refiners, however, reported crude oil as received only when they deemed the oil to have arrived at the refinery. *See* N. F. Mellen, J. P. Rozsa and M. B. Martin, *Validation of the Crude Oil Entitlements Information System* at 8-9 (July 1, 1981) (an independent study commissioned by DOE).

As found below by the district court, there has always been a financial incentive for refiners to utilize the laxity of DOE's definition of "receipts" to delay reporting the receipt of price-controlled crude oil and thus delay the purchase of entitlements. App. B at 18a. With the election in November, 1980 of a Presidential candidate committed to the immediate termination of the oil price and allocation system, however, the incentive was dramatically enhanced. After the election, the pliability of DOE's definition of receipts afforded some refiners the opportunity not only to delay the purchase of entitlements for crude oil purchased at controlled prices but to avoid the purchase of entitlements entirely. App. B at 20a.

As expected, President Reagan promptly terminated the price and allocation system, effective January 28, 1981. Executive Order 12287, 46 Fed. Reg. 9099 (Jan. 30, 1981). Nevertheless, DOE proposes to issue further Entitlements Notices based upon crude oil receipts prior to January 28, 1981: one based on receipts reported for the period January 1-27, 1981 ("the January Notice") and a "Clean-up Notice" to account for certain errors and adjustments in reported receipts for October, 1980 through January 27, 1981. 46 Fed. Reg. 12945 (Feb. 19, 1981); 46 Fed. Reg. 36092 (July 13, 1981).

The district court found that some refiners have taken advantage of the opportunity created by their method of counting receipts to cause immense quantities of price-controlled crude oil to disappear from the Entitlements Program. It found that a common method of evading entitlements obligations was to stockpile price-controlled crude oil, pending decontrol, before that oil reached the point in its progression from well head to refinery at which that refiner counted receipts. The hoarded price-controlled crude oil was thereby never "received" while the Entitlements Program was in effect. App. B at 33a. Similarly the district court found that

another manipulative inventory device could be employed to permit certain refiners to selectively deem their inventories to be made up entirely of price-controlled crude oil upstream of the point at which receipts were counted. App. B at 34a-36a.

Since the massive disappearance of price-controlled crude oil has concomitantly reduced the DOSR, refiners not engaging in these evasive practices either were permitted to sell fewer entitlements or were required to buy more, thus depriving them of their pro rata share of the benefits of access to price-controlled oil. The district court below found that in 1979 and 1980 $5.6 billion of entitlements were avoided through the disappearance of price-controlled crude oil, and concluded that as a result of such massive disappearance, the Entitlements Program operated in a fashion so as to defeat the purposes of the EPAA and of the Program itself. App. B at 29a and 67a.

In fact, DOE's own Office of Hearings and Appeals ("OHA"), has recognized that if Mobil's allegations concerning the disappearance of crude oil are true, issuance of the January Notice will be arbitrary and capricious. *See Mobil Oil Corporation*, Interlocutory Order, Case No. BEZ-0096, 8 DOE ¶____ (June 4, 1981). OHA declared that, if correct, Mobil's data "may indicate that [DOE's] interpretations of its rules for calculating old oil receipts under the Entitlements Program led to such manifestly arbitrary results during December, 1980, as to make reinterpretation or revision of the Program mandatory." *Id.* at 8.

Because OHA concluded that Mobil did not have, and could not be expected to have, complete data concerning the quantum of disappearing price-controlled oil, OHA proposed to obtain the necessary additional data. *Id.* Nevertheless, without gathering such data, OHA abruptly rejected Mobil's Appeal from the December Entitlements Notice. *Mobil Oil Corporation*, Decision

and Order, Case No. BEA-0630, 8 DOE ¶____ (July 8, 1981). OHA concluded that it had no jurisdiction to correct DOE's actions (even if they did produce arbitrary and capricious results) because (i) Mobil's complaints affect the calculation of the entire Notice, not simply Mobil's obligation thereunder, and (ii) avoidance of the arbitrary and capricious results would allegedly necessitate an amendment of the regulations, not merely a reinterpretation.

The district court found, and the Temporary Emergency Court of Appeals agreed, that the DOE has "sidestepped" its administrative responsibilities in failing to deal with the problem of disappearing price-controlled crude. App. A at 4; App. B at 74. Thus, unless DOE is directed by the judiciary to rectify the disappearance of price-controlled crude before the issuance of the January Notice, the firms responsible for the disappearance will be permitted to thwart and defeat the purposes of the Entitlements Program and the objectives of the EPAA.

B. The Effect On Ashland

Ashland is an independent refiner, which by definition produces or controls less than 30% of the crude oil that it refines. 15 U.S.C. § 752(3) (1976) and 10 C.F.R. § 211.51 (1981). Throughout the entire life of the Entitlements Program, Ashland has had access to only a small and continually declining quantity of price-controlled crude oil. During each month of 1980, for example, Ashland consistently received approximately 1% of the total price-controlled crude oil produced nationally. Ashland's Application For Administrative Relief Pursuant To Court Order at 62 (July 20, 1981). Furthermore, Ashland's crude oil costs during every month of the existence of crude oil price controls were higher than the national average.

As a result of its very limited access to price-controlled crude oil, Ashland was a seller of entitlements

from the issuance of the first Entitlements Notice in January, 1975 through the November, 1980 Entitlements Notice issued in January, 1981. *Ashland Oil, Inc. v. Department of Energy, et al.*, Civil Action No. C81-087L(A), Complaint For Declaratory And Injunctive Relief at ¶18 (March 30, 1981). Ashland was for the first time required by the December, 1980 Entitlements Notice to purchase $2,512,845.72 of entitlements. 46 Fed. Reg. 14157 (Feb. 28, 1981). In December, 1980, however, Ashland had still purchased only about 1% of the price-controlled crude produced and sold that month. OHA denied Ashland's Appeal of that Notice, citing its earlier denial of the Mobil Appeal from that same Notice. *Ashland Oil, Inc., et al.*, Decision and Order, Case No. BEA-0637, 8 DOE ¶____ (Sept. 14, 1981).

Although formerly a consistent seller of entitlements, Ashland estimates that, largely because of the disappearance of massive quantities of price-controlled crude, it will be required to purchase up to $100 million of entitlements under the January and Clean-up Notices. Concomitant with Ashland's surprising transformation from a seller to a substantial buyer of entitlements, certain of the major integrated oil companies suddenly reversed their previous position as major buyers of entitlements and became large sellers. 46 Fed. Reg. 14157 (Feb. 28, 1981). Such transformations are clear evidence that DOE's administration of the Entitlements Program defeats the goals of the EPAA and of the Program.

DOE's own data indicates that the DOSR for January, 1981 will be so low that refiners who have not engaged in either inventory or other manipulations, and who therefore reported the receipt of positive number of barrels of price-controlled crude oil, no matter how few, will incur entitlements obligations. 46 Fed. Reg. 17566 (Mar. 19, 1981); 46 Fed. Reg. 25315 (May 6, 1981). This

results from the fact that companies engaging in inventory and other manipulations discussed below have reported negative receipts of price-controlled crude oil. Contrary to DOE's and Tosco's allegations in this Court and below, therefore, issuance of the January and Clean-up Notices will work predominantly to the benefit of some major integrated refiners and to the detriment of most independent and small refiners.

On March 30, 1981, Ashland filed suit against DOE in the District Court for the Western District of Kentucky seeking to enjoin DOE's issuance of the January Notice. *Ashland Oil, Inc. v. Department of Energy, et al.*, Civil Action No. C81-087L(A) (hereinafter referred to as "the Ashland Litigation"). Like Mobil, Ashland alleges that DOE has knowingly permitted vast quantities of price-controlled crude oil to escape from the Entitlements Program, especially since the Presidential election in November. In addition, however, Ashland contends that DOE has also improperly administered the Tertiary Incentive Program, 10 C.F.R. § 212.78 (1981), thereby rendering the January Notice arbitrary, capricious, and unlawful. Further, Ashland alleges that DOE has unlawfully, without notice or a hearing, altered Ashland's report of crude receipts for January 1-27, 1981.

The Tertiary Incentive Program (administered by DOE as an adjunct to the Entitlements Program) was intended to alleviate the disincentives of price controls upon the use of expensive oil recovery techniques by permitting crude oil producers employing such techniques to sell at market prices crude oil which would otherwise have been sold at controlled prices. 10 C.F.R. § 212.78(a)(2) (1981). *See also* 42 Fed. Reg. 2646 (Jan. 12, 1977). Since the election of President Reagan, certain major integrated oil companies have manipulated the retroactive recertifications permitted by the Tertiary Incentive Program to curtail their entitlements purchase

obligations and thereby compel other refiners, especially independents, to subsidize their post-decontrol production of crude oil.

In two Notices of Proposed Rulemaking, DOE acknowledged the existence of the foregoing problems in the Tertiary Incentive Program. The problems described by DOE included the use of intra-company prepayments of future expenses to force independent refiners to subsidize many integrated companies' post-decontrol production of crude oil. 46 Fed. Reg. 17566 (Mar. 19, 1981); 46 Fed. Reg. 25315 (May 6, 1981). Nevertheless, in July, 1981, DOE suddenly reversed itself and declared that it would not adopt the regulatory changes which DOE had previously proposed to remedy the problem. 46 Fed. Reg. 36103 (July 13, 1981).

As noted above, Ashland's complaint also seeks relief from DOE's unilateral and unlawful alteration of data submitted by Ashland to DOE for January 1-27, 1981. Ashland submitted the data in accordance with the applicable regulations. DOE, in violation of its own regulations, without a hearing and without any investigation of the data submitted by Ashland, altered Ashland's data, but did not provide Ashland with a statement of the legal and factual bases for its action. Despite Ashland's repeated invitations, DOE has refused to examine Ashland's records. DOE has also steadfastly refused to provide Ashland with any explanation from the individual who ordered the alteration.

If Ashland is required to purchase a significant number of entitlements because of the unlawful actions of DOE challenged in Ashland's complaint, Ashland will incur irreparable injury. *Ashland Oil, Inc. v. Department of Energy, et al.*, Civil Action No. C81-087L(A), Complaint For Declaratory And Injunctive Relief at ¶39 (March 30, 1981). Since a decision in the Ashland Litigation may be appealed to the Temporary Emergency

Court of Appeals, Ashland has a substantial interest in that court's ruling regarding irreparable injury. 15 U.S.C. § 754(a) (1976); 12 U.S.C. § 1904 (Note) (1976).

On April 14, 1981 the District Court for the Western District of Kentucky issued a Temporary Restraining Order which provides that Ashland "shall not be required to comply with the requirements of [the January Notice] until further orders of this Court." DOE subsequently moved for dismissal of Ashland's suit, representing to the court that DOE could provide Ashland with procedural rights similar to those afforded it in the federal district court, including discovery and an evidentiary hearing. *See* Transcript of Hearing in the United States District Court for the Western District of Kentucky at 44-46, 66-68 (April 21, 1981) and Memorandum In Support Of Defendants' Motion To Dismiss And In Opposition To Plaintiffs' Motion For A Preliminary Injunction at 20-23. On June 1, 1981, the court stayed any decision on the merits of the Ashland Litigation pending review by DOE of the issues raised by Ashland therein, but stipulated that the April 14 Temporary Restraining Order would remain in effect during those administrative proceedings. *Ashland Oil, Inc. v. Department of Energy, et al.*, Civil Action No. C81-087L(A), Order and Memorandum Opinion (June 1, 1981).

Ashland's subsequent efforts to obtain meaningful administrative redress are illustrative of the inefficacy of DOE's administrative procedures for correction of the abuses described in Mobil's and Ashland's complaints. On July 20, 1981, pursuant to the district court's order, Ashland filed with OHA an "Application For Administrative Relief Pursuant To Court Order." Ashland's single, integrated application for relief was divided by OHA into four separate proceedings. *See* Telex from Thomas L. Wieker, Deputy Director, Office of Hearings and Appeals, to Thomas A. Donovan (July 23, 1981) and *Ashland Oil,*

Inc., et al., Decision and Order, Case No. BEA-0637, 8 DOE ¶____ (Sept. 14, 1981).

Ashland has moved for discovery and evidentiary hearings in the proceeding designated by DOE as an Appeal from DOE's alteration of Ashland's report and in the proceeding designated as an Application For Exception, which relates to the problems of disappearing price-controlled oil and abuse of the Tertiary Incentive Program. Prior to ruling on Ashland's motion for discovery in the Appeal, OHA required Ashland to present the merits of its case at a hearing held on August 17, 1981. OHA thereafter denied Ashland's motions for discovery and an evidentiary hearing concerning the factual and legal bases for DOE's unilateral alteration of Ashland's reported data, despite DOE's earlier representation to the district court that Ashland would have such rights in the administrative proceeding. *Ashland Oil, Inc.*, Decision and Order, Cases No. BED-0710 and BEH-0710, 8 DOE ¶____ (Sept. 14, 1981). Similarly, OHA has required Ashland to file a brief presenting all of the information in support of the Application For Exception prior to ruling on the motion for discovery by which Ashland sought to obtain supporting information which is solely within the possession of DOE. OHA has still not ruled on Ashland's motions for discovery and for an evidentiary hearing in the exception proceeding.

III. SUMMARY OF ARGUMENT

As more fully set forth by Mobil in its Petition for Certiorari, the standard for granting a preliminary injunction applied by the Emergency Court of Appeals below directly conflicts with the standards applied by certain of the circuit courts of appeals. In addition, this standard is inconsistent with the statutory scheme establishing the Temporary Emergency Court of Appeals.

Contrary to the rationale underlying the decision of the Emergency Court of Appeals, if DOE issues its final entitlements notices prior to resolving the problem of disappearing price-controlled oil, neither Mobil nor small and independent refiners will have any practical, effective remedy by which to recover the funds which they will wrongfully be compelled to expend in the purchase of excessive entitlements. Additionally, because of the manner in which DOE has avoided judicial review while disingenuously both denying knowledge of the problem of disappearing price-controlled oil and failing to resolve that problem administratively, review by this Court is necessary to prevent an erosion of public confidence in the administrative process. Finally, the competitive vigor of the independent refiners will be endangered by the issuance of the final entitlements notices under DOE's present administration of the Program.

IV. ARGUMENT

A. The Emergency Court's Standard For Granting A Preliminary Injunction Conflicts With The Decisions Of Various Other Courts Of Appeals And With The Purpose Of The Statute Establishing The Emergency Court.

As pointed out in the Petition for Certiorari, the standard for granting preliminary injunctions applied by the Emergency Court of Appeals in this case directly conflicts with the standards applied by various circuit courts of appeals. Petition for Certiorari at 11-20. While any inconsistency among the courts of appeals on such on important matter is cause for concern, it is especially so when the conflict reaches into a court which was specially created by Congress "in order to funnel into one court of appeals all the appeals [relating to certain federal statutes] arising out of the district courts [including *inter alia* appeals arising under the EPAA] and thus *gain*

in consistency of adjudication," as well as to insure prompt adjudication of all matters coming before it. S. Rep. No. 92-507, 92d Cong., 1st Sess. (1971) at 10-11 (emphasis added). Therefore, since certain cases arising in district courts in all of the circuits are reviewed on appeal only by the Temporary Emergency Court of Appeals, it is especially important that its standards for relief be clear and consistent with those of the courts of appeals for the circuits in which those cases arise.

In its decision in this case, the Temporary Emergency Court of Appeals has exacerbated the confusion and uncertainty surrounding the granting of preliminary injunctions. The appellate court below cites *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356 (2d Cir. 1976), as the authority for requiring Mobil to make a "clear showing that it will suffer irreparable injury." App. A at 42. But the standard applied by the appellate court in this case is in fact very different from that applied in *Triebwasser*, which required only that the plaintiff "make a clear showing of *the threat* of irreparable harm." *Triebwasser & Katz v. American Telephone & Telegraph Co., supra* at 1359 (emphasis added).

Thus the standard for preliminary injunctions, in addition to having been the subject of sharp conflict among the circuits, has by virtue of the decision below become a matter of considerable uncertainty within the Temporary Emergency Court of Appeals itself. This uncertainty will lead to unnecessary protraction of disputes falling within that court's jurisdiction, including other suits challenging the issuance of the last entitlements notices.[3]

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3. *E.g.*, Ashland Oil, Inc. v. Department of Energy, et al., Civil Action No. C81-087L(A), Western District of Kentucky; Shell Oil Company v. Department of Energy, et al., Civil Action No. 81-339,

Furthermore, the same statute which established the Emergency Court provides especially for the granting of preliminary injunctions "in order to provide relief for a particular person who may be aggrieved by the operation of this program during the period in which he is attempting to establish his legal position." *See* 12 U.S.C. § 1904 (Note § 211) (1976); S. Rep. No. 92-507, *supra* at 11-12; and 15 U.S.C. § 754(a) (1976). Although Congress may not thereby have intended to obviate the necessity of satisfying the traditional bases for preliminary relief,[4] Congress clearly did not intend to render it *more difficult* to obtain an injunction in cases falling under the purview of the statute.

The decision of the appellate court below, however, has the practical effect of creating such increased difficulty. Mobil's appeal was diverted from the Second Circuit, which has consistently applied a less demanding standard for preliminary relief, *see e.g., Triebwasser & Katz v. American Telephone & Telegraph Co., supra*, and *Charlie's Girls, Inc. v. Revlon, Inc.*, 483 F.2d 953 (2d Cir. 1973) *(per curiam)*, into the special Temporary Emergency Court of Appeals where a substantially more rigor-

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District of Delaware; and Little America Refinery Company v. United States Department of Energy, et al., Civil Action No. C81-0263, District of Wyoming.

4. There is, of course, lower court authority for the proposition that all the traditional requirements for an equitable injunction need not be met when the injunction is statutorily authorized. *See e.g.*, L. C. Page & Co. v. Fox Film Corp., 83 F.2d 196, 200 (2d Cir. 1936), Uneeda Doll Co. v. Goldfarb Novelty Co., 373 F.2d 851, 852 n.1. (2d Cir. 1967), *cert. dismissed*, 389 U.S. 801 (1967). While it is unnecessary in the instant case for the Court to decide that a different standard is required for a statutory injunction, as opposed to a purely equitable injunction, this *amicus curiae* submits that when a special court of appeals applies a more demanding standard for a statutorily authorized injunction than other circuits apply in granting purely equitable injunctions, this anomaly calls for either approval or correction by the Supreme Court.

ous standard was applied. Thus the action of the court below contradicts its legislative mandate. The resulting uncertainty and inconsistency surrounding the standard for granting preliminary injunctions in the federal courts can only be remedied by this Court.

B. This Court Should Grant Mobil's Petition For Certiorari Because The Remedies Relied Upon By The Temporary Emergency Court Of Appeals Are Illusory.

The court found that the remedies to which the Emergency Court consigns Mobil are illusory and that remanding this case to DOE would be futile and would have the practical effect of denying Mobil judicial review. App. B at 51a-55a. Mobil has sought to bring the problem of disappearing crude oil to the attention of DOE over the past four years. Finally, on February 10, 1981, Mobil petitioned DOE for an emergency rulemaking to ensure that every barrel of price-controlled crude oil received but not previously reported during the course of the Entitlements Program would be subject to the entitlements obligation. App. B at 42. DOE's inaction for seven months must be deemed tantamount to a denial.

Since DOE successfully argued to OHA that OHA had no jurisdiction to hear Mobil's Appeal from the December Entitlements Notice, App. A at 5a., DOE cannot now be heard to assert that an appeal of that decision is an adequate remedy for Mobil, unless it also admits that OHA's previous ruling was erroneous.

Finally, the Emergency Court of Appeals concluded erroneously that the clean-up rules promulgated by DOE provided an effective administrative remedy to Mobil. *See* 10 C.F.R. § 211.69, added July 9, 1981, 46 Fed. Reg. 36092 (July 13, 1981) (the "Clean-up Regulations). DOE admits in its preamble to the Clean-up Regulations that a remedy for disappearing oil "would be beyond the scope of this rulemaking." 46 Fed. Reg. 36092, 36093

(July 13, 1981). Since the Clean-up Regulations do not deal with the subject of disappearing oil, an appeal from those rules would not constitute a remedy for that problem.

DOE has repeatedly asserted that if the disappearing price-controlled oil problem is to be resolved at all, it should be resolved through enforcement proceedings initiated by DOE against the offending firms. Not only has DOE failed to initiate such enforcement proceedings, but the Clean-up Regulations specifically exclude the distribution to Program participants of monies resulting from any enforcement actions DOE should ever elect to initiate. Indeed, recent DOE actions indicate that any DOE enforcement actions would inure, at DOE's election, to the benefit of the Federal Treasury. 46 Fed. Reg. 26681, 26683 (May 14, 1981). DOE has, in fact, publicly stated that it intends to wrap up the Entitlements Program without correcting its inequities. Legal Times of Washington, June 29, 1981 at 6.

DOE has continually asserted to the judiciary that administrative remedies are available to refiners when in fact they are not. Thus, DOE represented to the district court in Kentucky that OHA had jurisdiction to resolve the issues raised in Ashland's complaint, *see* Transcript of Hearing in the United States District Court for the Western District of Kentucky at 44-45 and 50 (April 21, 1981), while simultaneously arguing successfully before OHA that OHA lacked jurisdiction over Mobil's Appeal raising identical issues. *See Mobil Oil Corporation*, Decision and Order, Case No. BEA-0630, 8 DOE ¶____ (July 8, 1981). Similarly, although DOE represented to the district court that discovery and other evidentiary proceedings were available to Ashland, Transcript, *supra* at 60, DOE has consistently resisted every attempt by Ashland to obtain information from the agency concerning problems which were raised in the Ashland Litigation.

C. This Court Should Grant Mobil's Petition For Certiorari In Light Of The Important Issues Which The Case Raises Concerning The Integrity Of The Administrative Process.

DOE's four-year failure to remedy the disappearing oil problem and its misrepresentation of its knowledge of the problem raise important questions concerning the administrative process. App. B at 53a. Even the appellate court below acknowledged DOE's recalcitrance toward resolving the problem.

> Although [DOE] has attempted to discredit Mobil's method of quantitative analysis of the evidence, the [DOE] apparently lacks knowledge of the degree to which upstream stockpiling of crude oil and the use of time exchanges increased towards the end of the program as Mobil alleges. Moreover, as far as we know, [DOE] has shown no inclination to obtain such knowledge.

Mobil Oil Corporation, Decision and Order, Case No. BEA-0630 at 1, 19-20, 8 DOE ¶____ (July 8, 1981), *quoted at* App. A at 6a-7a.

The district court, after a full evidentiary hearing, concluded that DOE was denying knowledge of the problem in order to avoid judicial review of DOE's failure to address the issue:

> The DOE has attempted to suppress the fact that it has conducted and commissioned studies on this problem [disappearing oil] and its impact on the entitlements program. . . . Moreover, the DOE has pretended to disguise its own failure to investigate these issues after having been put on notice of the situation at least four years ago . . . .
>
> . . .

> Unfortunately through its inaction, the DOE has not formulated ... a response to the disappearing price-controlled oil problem. Instead, it has pursued three different courses of action. First the DOE has decided to proceed full steam with the release of the post-decontrol entitlements notices, and has ignored the serious inaccuracies contained therein. Second, despite the far reaching implications this decision has had on the entitlements program refiners, the DOE has sought to leave the impression that its decision to issue post-decontrol entitlements notices does not amount to a policy determination on these implications. The DOE has also tried to cover-up the fact that each of the studies it has conducted or commissioned on the problem and causes of disappearing price-controlled crude oil, and its impact on the entitlements program, reported virtually identical results. By conveniently ignoring this fact, and by sitting back and feigning to be aware of the problem of disappearing price-controlled crude, though ignorant of its "actual" causes and possible solutions, the DOE has attempted to fend off judicial intervention into a problem it likely caused in the first place.

App. B at 52a-54a.

The foregoing decisions show that (i) DOE has disingenuously attempted to ignore problems engendered by the Department, even when those problems preclude the accomplishment of the purposes of the regulatory program and (ii) that DOE has utilized the doctrine of judicial restraint to evade scrutiny of its conduct. These conclusions raise grave issues concerning the Department's execution of its public trust. If the problems go unremedied because the Emergency Court of Appeals relies upon DOE to put its own house in order, public confidence in the administrative process may be seriously impaired.

D. Review By This Court Is Necessary In Light Of The Public Importance Of The Temporary Emergency Court Of Appeals Decision And The Effect Of The Decision Upon The Competitive Vitality Of The Refining Industry.

The purpose of the Entitlements Program is to allocate equitably among all refiners the financial benefits to be derived from access to price-controlled crude oil. 39 Fed. Reg. 31650 (Aug. 30, 1974); 39 Fed. Reg. 39740 (Nov. 11, 1974); *Pasco, Inc. v. Federal Energy Administration*, 525 F.2d 1391, 1395 (TECA 1975). Those refiners who have hoarded price-controlled crude oil until after the effective date of decontrol, without purchasing entitlements, thereby obtain windfall benefits and gain a significant competitive advantage over the small independent refiners. The competitive vigor of the independent refining sector will be sapped by the loss of millions of dollars.

In light of the foregoing it was entirely appropriate for the district court to grant Mobil's request for injunctive relief. As this Court stated in *Virginian Railway Co. v. System Federation*, 300 U.S. 515, 552 (1937):

> Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.

V. CONCLUSION

For the reasons set forth, Ashland Oil, Inc., respectfully requests that this Court grant Mobil's Petition For A Writ Of Certiorari To The United States Temporary Emergency Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Ashland Oil, Inc. as *Amicus Curiae* were served this 25th day of September, 1981, on each of the following by hand.

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No. 81-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, JAMES B. EDWARDS, SECRETARY OF ENERGY, AND TOSCO CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF CROWN CENTRAL PETROLEUM CORPORATION AS *AMICUS CURIAE*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF CROWN CENTRAL PETROLEUM CORPORATION AS *AMICUS CURIAE*

Crown Central Petroleum Corporation ("Crown") respectfully submits its brief as *Amicus Curiae,* upon written consent of all parties, in support of the Petition of Mobil Oil Corporation ("Mobil") for a Writ of Certiorari to review the judgment of the United States Temporary Emergency Court of Appeals ("TECA") entered in *Mobil Oil Corporation v. DOE,* ___ F.2d ___ (No. 2-35) on August 14, 1981.

THE INTEREST OF THE AMICUS CURIAE

The present case involves the close-out by the Department of Energy ("DOE") of the Entitlements Program which was established pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sec. 751 *et seq.* ("EPAA"). The basic purpose of the Entitlements Program was to enable petroleum refiners who had disproportionately small access to supplies of low price crude oil to secure the same economic benefits as would have been secured if they had had access to a proportionate share and, conversely, to require those petroleum refiners who had access to a disproportionately large share of low price crude oil to give up some of the benefits. This intent was achieved by granting "entitlements" to those refiners who had a disproportionately small share of low price crude oil which could be sold to, and were required to be purchased by, those refiners who had access to a disproportionately large share of low price crude oil. *See Pasco, Inc. v. Federal Energy Administration,* 525 F.2d 1391, 1395 (Em. App. 1975).

Mobil has been historically a petroleum refiner with better than average access to low price crude oil and, therefore, has been an obligated purchaser of entitlements. The basic thrust of Mobil's complaint is that the Entitlements Program is being closed out in a manner which has caused and will cause it to purchase more entitlements for more money than may lawfully be required of it.

Crown, as a "small" and "independent" refiner within the definitions of those terms in Sec. 3 of the EPAA, 15 U.S.C. Sec. 752(3) and (4), historically had a disproportionately lesser share of low price crude oil and, accordingly, has been and probably will be the recipient of entitlements which it can sell. It would therefore seem at first blush, that the interests of Mobil as an historical purchaser and probable future purchaser of entitlements

would be directly adverse to the interests of Crown as an historical seller and probable future seller of entitlements. However, this is not true.

The evidence introduced at the hearing before the District Court showed that Mobil very probably purchased more entitlements than it should have been obligated to purchase, primarily because it fully reported all low price crude oil to which it had access during the waning months of the control period, while some other petroleum refiners took advantage of parts of the DOE regulations which ostensibly permitted deferral of the recognition of such access. This same evidence would show that Crown probably sold fewer entitlements than it would have otherwise been able to sell because it also fully reported all low price crude oil to which it had access.

Therefore the real conflict in interest lies between those petroleum refiners such as Mobil and Crown who fully reported all low price crude oil to which they had access and those refiners who took advantage of the regulations and would be benefited if DOE does not act and require a full accounting. These latter refiners are not before the Court, since their interest will be best served by an appearance that the issuance of the preliminary injunction by the District Court harmed all refiners who have been selling entitlements and benefited only the few refiners who have been purchasing entitlements. Crown, like Mobil (and it is believed, any other refiner which has fully reported its actual receipts of price-controlled crude oil regardless of its size or status as a buyer or seller of entitlements), will suffer irreparable injury unless there is an available remedy to require that all low price crude oil is fully accounted for in the termination of the Entitlements Program.

SUMMARY OF ARGUMENT

The Court of Appeals in this case substituted its own judgment for that of the District Court with respect to the facts and also with respect to the District Court's exercise of its discretion in issuing a preliminary injunction. In so doing, TECA appears to have misunderstood the operation and effects of the Entitlements Program. This misunderstanding of the facts has apparently led TECA to the erroneous conclusion that the Petitioner in this case will have an adequate remedy without the preliminary injunction entered by the District Court. If the Respondent Department of Energy is permitted, by the denial of the motion for preliminary injunction, to continue the close-out of the entitlements program, the Petitioner and others similarly situated will suffer irreparable harm.

ARGUMENT

This Court should grant Mobil's Petition for a Writ of Certiorari to review the judgment of the Court of Appeals in this case. The judgment of the Court of Appeals which would deny Mobil's motion for a preliminary injunction against the issuance by the DOE of the January, 1981 entitlements notice (the administrative order requiring the purchase and sale of entitlements for the final month of the program), is in conflict with established principles of law and would result in grave and irreparable injury not only to Mobil, but also to Crown and to others.[1]

It is important to note initially that Mobil did not seek an absolute injunction of the January entitlements list, but only an injunction until such time as the Respondent DOE is prepared to issue a list which fully takes into

[1] Neither the opinion of the Court of Appeals nor that of the District Court is reported, but both are reprinted respectively as Appendix A and Appendix B to Mobil's Petition for a Writ of Certiorari (hereinafter cited as Mobil App. A and Mobil App. B).

account all volumes of price-controlled crude oil acquired prior to January 28, 1981. Neither Mobil nor anyone else, whether a buyer or seller of entitlements, will receive any permanent benefit from the injunction except to the extent it compels a correction of the deficiencies which have occurred by reason of the manner in which DOE has operated the program.

There is no real dispute that the action which DOE, if not enjoined from so doing, intends to take with respect to the January list would not effect a resolution of all disputed issues. Although DOE has relied heavily upon its purported "clean-up" mechanism, see 46 Fed. Reg. 36,092 (July 13, 1981),[2] such a mechanism would only establish *pro rata* shares of possible adjustments based on the Entitlements Program as it currently exists and provides no remedy for the serious defects which are the basis of Mobil's claims in this action, which the District Court found to be inherent in the regulations applicable to the reporting of data upon which the January list is based and which the District Court further found will not be rectified by DOE absent the entry of a preliminary injunction. Mobil App. B at 49a, 53a, 61a, 70a, 77a.

A brief analysis of the operating mechanisms of the Entitlements Program is necessary for a full understanding of the effects of this non-action by DOE. Under the Entitlements Program, DOE is obligated first to determine the total quantity of crude oil acquired by all refiners from all sources and the percentage of that total quantity which is represented by acquisition by all refiners in the aggregate of low price controlled crude oil. 10 C.F.R. Sec. 211.62, 211.66(h). DOE is next required to determine the

[2] This final rule was issued by DOE during the pendency of this case before the Court of Appeals and was relied upon by TECA in its opinion. Mobil App. A at 5a.

percentage of the total acquisitions of crude oil by each particular refiner which consists of low price controlled oil. If the percentage of a particular refiner's total acquisitions of crude oil which consists of low price controlled oil is less than the industry average, that refiner becomes a seller of entitlements in an amount necessary to bring it up to the industry average. 10 C.F.R. Sec. 211.67(c). Conversely, if a refiner's percentage of low price controlled oil is greater than the industry average, that refiner is obligated to buy enough entitlements to bring its percentage down to the industry average. 10 C.F.R. Sec. 211.67(b)(1). Of necessity, the entitlements to be sold must equal the entitlements to be purchased.

The Entitlements Program does not provide for a direct matching by DOE of sellers of entitlements and purchasers of entitlements. Rather, it provides that after DOE has made its determination of those refiners who are sellers of entitlements and the amounts to be sold and of those refiners who are buyers of entitlements and the amounts to be purchased, each individual seller will seek out a buyer or buyers and each individual buyer will seek out a seller or sellers between whom sales and purchases will be effected.[3]

Further, it is clearly impossible for the DOE to make a proper computation of the respective rights and obligations of the participants in the program if the data reported to DOE by some refiners do not reflect all volumes of price-controlled crude oil. An after-the-fact change to the data reported by any one refiner necessarily requires a change not only to that refiner's rights and

[3] The regulations provide for specific matching if a putative buyer of entitlements is unable to locate a seller. 10 C.F.R. Sec. 211.67(k).

obligations, but also to those of all other participants in the program who may or may not have had any dealings with each other. Consequently, it is not possible to make an adjustment in one refiner's right to sell entitlements or in one refiner's obligation to buy entitlements without making offsetting adjustments.

Mobil has asserted in the present case that there have been serious errors and deficiencies in the establishment and the administration of the Entitlements Program which have caused it to make payments greatly in excess of what it should be required to pay. It has further asserted that if the January entitlements list is issued without correction of these errors and deficiencies, it will be obligated to pay additional amounts in excess of its just obligations and will have no real opportunity to ever recover the excessive amounts which it has already paid or the further excessive amounts which it would be required to pay under the proposed January entitlements list. There does not seem to be any real dispute that there have been such errors and deficiencies which may have had the consequences asserted by Mobil. In fact, this is recognized by TECA in its opinion in the present case. See Mobil App. A at 6a. However, contrary to the findings of the District Court, TECA has implied the view that these errors and deficiencies could be corrected by suits by Mobil against the refiners from which it has purchased entitlements and that, therefore, it is not necessary to enjoin the issuance of the list. It is submitted that this view of TECA reflects a complete failure to understand the nature of the Entitlements Program and its method of operation.

If the January entitlements list is issued, each refiner shown thereon as a seller of entitlements will have a *prima facie* right to sell the designated entitlements. See 10 C.F.R. Sec. 211.67(c). Before Mobil could have any

recovery from the refiners from which it purchased entitlements, it would have to show that such refiner was not entitled to sell the entitlements which it sold but instead was only entitled to sell a lesser number. It by no manner of means follows that merely because Mobil's obligations to purchase are lessened, the rights of the refiners from which it has purchased entitlements are correspondingly decreased. In fact, if the particular refiners from whom Mobil purchased entitlements are similar to Crown (whose rights to sell would probably be increased by a correction of the errors and deficiencies) the reduction in Mobil's obligations would be coupled with an increase in the rights of the refiners from which it has purchased the entitlements. Possibly, a court could hold that Mobil should be entitled to recover from the seller to it and the seller should be forced to seek recourse against someone else. Equally possible, the court might hold that since the seller had sold what it was lawfully entitled to sell, Mobil would be left to seek recourse only against someone else. As the District Court appropriately observed in its opinion, which is not even mentioned by TECA in its opinion:

> "As a primary matter, the Court knows of no case, and the parties have cited none, which involved the factual situation before the Court today. The possible claims and counterclaims that could be made in such an action would seem more appropriately resolved in a law school classroom than in a court of law." Mobil's App. B at 78a.

It is respectfully submitted that the present case involves a classical situation which has consistently been regarded as warranting the issuance of a preliminary injunction to preserve the status quo. *See* 7 Moore, Federal Practice Par. 65.04(1) at 65-36 (2d Ed. 1980); *Meis v. Sanitas Service Corp.*, 511 F.2d 655, 658 (5th Cir. 1975); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738,

742 (2d Cir. 1953); cf. *SCM Corp. v. Xerox Corp.*, 507 F.2d 358, 361-62 (2d Cir. 1974). It is clear, at the very least, that it is not clear that Mobil will have a clear and certain remedy if the injunction does not issue. It is further clear that if the injunction does not issue, the proposed January entitlements list is issued and payments are made thereunder and thereafter an attempt is made to correct the errors and deficiencies, there will be a multiplicity of suits with all of the attendant possibilities of conflicting determinations and the certainty of an enormous expenditure of judicial time, but no prospect of an adequate remedy.[4] Concomitantly, it is equally clear that the "avenues of administrative relief" (Mobil App. A at 5a) suggested by TECA do not provide, absent the entry of a preliminary injunction, any means of preventing the irreparable injury which will result from the issuance of the January entitlements list. Moreover, it is respectfully suggested that the rule of deference by the courts to administrative action, would be best served by a continuance of the injunction until such time as DOE has taken all necessary administrative action with such

[4] As appears from both the opinion of TECA and the opinion of the District Court, the matter of the issuance of the January entitlements list and the matter of correcting the errors and deficiencies which have occurred in establishing and operating the Entitlements Program, have already been the subject of numerous judicial and administrative proceedings. See, e.g., *Ashland Oil, Inc. v. DOE*, No. 81-0871(A) (W.D.Ky); *Tosco Corp. v. DOE*, No. R-81-99 (N.D.Nev.); *Standard Oil Co. v. DOE*, No. C-81-1706 (N.D. Ohio); *Diamond Shamrock v. DOE*, No. 81-101 (D.Del.); *Boise Cascade Corp. v. Edwards*, No. 81-378 (D.Del.); *Union Oil Co. of Cal. v. DOE*, No. 81-1961THJ (C.D. Cal.); *Little America Ref. Co. v. DOE*, No. C-81-0263 (D. Wyo.). It is further suggested that the problems of a potential multiplicity of suits and conflicting determinations could be avoided by invoking the rules for multi-district litigation under which all cases could be heard by a single court and every refiner or other person affected by the Entitlements Program could intervene and present its interest.

prodding by the District Court as it may deem appropriate to avoid undue delays.

The District Court received an enormous amount of evidentiary material which it carefully and exhaustively considered in reaching the conclusion that the preliminary injunction should issue. TECA reversed, not on the grounds that the District Court misread the law, but rather on the apparent grounds that the District Court erred in its factual findings or possibly on the grounds that it exercised its discretion in a way which TECA would not have exercised such discretion.

It is submitted that this reversal was erroneous. TECA has no authority to reverse a factual determination by the District Court unless such factual determination is "clearly erroneous". Fed. R. Civ. P. 52(a); *Duke Power Co. v. Carolina Environ. Study,* 438 U.S. 59, 76-77 (1978); *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 662 (1977) (Stevens, Brennan, White and Marshall, JJ. dissenting); *Union de Tronquistas de Puerto Rico v. Arlook,* 586 F.2d 872, 876 (1st Cir. 1978). It equally has no authority to substitute its discretion for the discretion of the District Court unless there has been an abuse of discretion. *Doran v. Salem Inn,* 422 U.S. 922, 931-32 (1975); *Brown v. Chote,* 411 U.S. 452, 456-57 (1973). Therefore, certiorari should be granted and this Court should reverse the decision of the Court of Appeals and sustain the decision of the District Court entering the preliminary injunction which is necessary to preserve the right of Mobil and others similarly situated to a meaningful and adequate remedy to redress the errors committed by DOE.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 81-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, JAMES B. EDWARDS, SECRETARY OF ENERGY, AND TOSCO CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Temporary Emergency Court Of Appeals

BRIEF AMICUS CURIAE FOR HUNT OIL COMPANY

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On Petition For Writ Of Certiorari To The United States Temporary Emergency Court Of Appeals

BRIEF AMICUS CURIAE FOR HUNT OIL COMPANY

In accordance with Rule 36 of the Supreme Court Rules, Hunt Oil Company (Hunt) files this brief *amicus curiae* in support of Mobil Oil Corporation's (Mobil's) Petition for Writ of Certiorari. Pursuant to that rule, letters of consent from the parties have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

Hunt is a "small" and "independent" refiner, as defined in Section 3 of the Emergency Petroleum Allocation Act of 1973, as amended. 15 U.S.C. § 752. It operates a refinery in Tuscaloosa, Alabama with a certified capacity of 35,000 barrels per day. Hunt has been a participant in the Department of Energy's (DOE's) Entitlements Program since its inception and has historically been a seller of entitlements benefits.

More recently, however, Hunt has been forced to become an entitlements buyer, a development which it believes is at least in part attributable to the program's accounting distortions with respect to reported receipts of price-controlled crude oil. As Mobil has well documented in other administrative and judicial forums, the disappearance of price-controlled crude oil from the Entitlements Program has forced many refiner participants to bear a disproportionate entitlements burden. Hunt estimates that its net entitlements purchase obligation for the post-decontrol entitlements lists would be reduced by as much as fifty (50) percent if all price-controlled crude that has escaped entitlements obligations since the program's inception were factored into these lists.

DOE plans to issue its final entitlements notices without rectifying the distortions caused by this underreporting of price-controlled crude oil, a phenomenon sanctioned by its own regulations. Thus, Hunt has an abiding interest in Mobil's request for judicial intervention in order to force DOE to correct its unjust imposition of entitlements burdens on all refiners participating in the Entitlements Program.

SUMMARY OF ARGUMENT

The decision below extends and aggravates the disparity of opinion which exists concerning the standard which must be satisfied in order to support a district court's grant of preliminary injunctive relief. In conflict with prior decisions of this Court and with those of most other courts of appeals, the court below embraced an unreasonably stringent standard for such relief in ruling that a moving party must first prove with certainty that it will suffer irreparable injury absent the injunction's issuance. Further obfuscating the appropriate standard, the court of appeals failed even to consider the district

court's findings of fact with respect to factors held equally relevant by this Court and by courts in other circuits, such as the high probability of the moving party's success on the merits of the case, the relative lack of harm to the respondents and to other affected parties, as well as the weight of the significant public interest which is at stake. So that the availability of what is among the most crucial of judicial remedies will no longer be subject to such divided debate, this Court should grant Mobil's request for writ of certiorari.

ARGUMENT

A. The Decision Below Further Confuses The Conflict Between Federal Appeals Court Circuits Regarding The Standard For Granting A Preliminary Injunction

Mobil rightly points out in its petition to this Court for writ of certiorari that the federal appeals courts are in disagreement as to the proper standard to be applied by a district court when presented with a motion for preliminary injunctive relief. Petition for Writ of Certiorari at 11-13. If left undisturbed, the decision below would further obscure the already uncertain matter of what grounds must be considered, and with what weight, when such a request for interim relief is made.

The court of appeals in this case vacated the district court's grant of a preliminary injunction prohibiting the respondents Department of Energy and Secretary James B. Edwards (hereinafter collectively referred to as DOE) from issuing the January entitlements notice. It held that the district court should not have granted relief because Mobil "failed to make a *clear showing that it will suffer irreparable harm* if an injunction does not issue." *Mobil Oil Corp* v. *DOE*, No. 2-35 (Temp. Emer. Ct. App., August 14, 1981), reprinted in Appendix A to Petition for Writ of Certiorari at p. 4a (hereinafter App. ____ at ____)

(emphasis added). The ruling implies, in contrast with prior decisions of this Court and with those of most other courts of appeals, that a party seeking a preliminary injunction must first prove with certainty that irreparable harm will occur absent the injunction.

In *Brown* v. *Chote*, 411 U.S. 452 (1973), this Court noted that the proper standard for issuance of a preliminary injunction requires a balancing of the movant's possibilities of success on the merits and the possibility of irreparable harm absent interlocutory relief. *Brown* involved a constitutional challenge to a California statute requiring candidates in primary elections to pay a filing fee. The district court granted a preliminary injunction sought by an allegedly indigent candidate against enforcement of the statute, concluding that "plaintiff may prevail on the merits and that, absent a preliminary injunction, his constitutional right may be irreparably lost." *Chote* v. *Brown*, 342 F.Supp. 1353, 1355-56 (N.D. Cal. 1972). This Court held that the district court

> properly addressed itself to two relevant factors: first, the appellee's possibilities of success on the merits; and second, the *possibility that irreparable injury would have resulted*, absent interlocutory relief . . . [I]ssuance of the injunction reflected the balance which that court reached in weighing these factors . . .

411 U.S. at 456 (emphasis added).

As recognized in *Brown*, the availability of a preliminary injunction depends upon the moving party's showing as to a number of relevant factors. That the district court is charged with *weighing* these factors in conjunction with each other reflects the fact that absolute proof with respect to one of the criteria is not a prerequisite for relief. This stands in decided contrast with the view expressed by the court below that, apart from evidence adduced as

to any other factor, irreparable harm must be conclusively proven in order for a preliminary injunction to issue.

The various federal appellate circuits are already in conflict regarding the appropriate grounds for granting interim injunctive relief. For example, both the Second and Ninth Circuits have adopted the so-called Gresham test for granting such relief, as stated in *Gresham* v. *Chambers*, 501 F.2d 687, 691 (2d Cir. 1974). Under this test, a preliminary injunction may issue upon a clear showing of either 1) probable success on the merits and possible irreparable harm, or 2) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly toward the applicant for the injunction. *Triebwasser & Katz* v. *A.T.&T. Co.*, 535 F.2d 1356, 1358 (2d Cir. 1976); *Aguirre* v. *Chula Vista Sanitary Service*, 542 F.2d 779, 781 (9th Cir. 1976).

A slightly different formulation constitutes the relevant standard in the Fourth, Sixth, Eighth, and the District of Columbia Circuits. In courts of those circuits, no single factor is determinative; rather, the district court must consider four criteria: 1) the likelihood of the moving party's success on the merits of the case; 2) the likelihood of irreparable harm to the applicant absent the injunction; 3) the likelihood and degree of harm to the non-moving party and to other parties should the injunction issue; 4) the public interest. *Telvest, Inc.* v. *Bradshaw*, 618 F.2d 1029, 1032 (4th Cir. 1980); *Roth* v. *Bank of the Commonwealth*, 583 F.2d 527, 536-538 (6th Cir. 1978); *Dataphase Systems, Inc.* v. *C L Systems, Inc.*, 640 F.2d 109, 112-113 (8th Cir. 1981); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Still another standard for granting a preliminary injunction has been embraced by the Seventh Circuit,

which has held that a district court must balance the probability of the moving party's success on the merits against the consequences of immediate irreparable injury possibly stemming from denial of the injunction. *Citizens for a Better Environment* v. *City of Park Ridge*, 567 F.2d 689, 690-691 (7th Cir. 1975).

A more restrictive interpretation of the grounds required to justify the grant of a preliminary injunction has been adopted by at least two other circuits. In *Continental Group, Inc.* v. *Amoco Chemicals Corp.*, 614 F.2d 351 (1980), the Third Circuit ruled that the moving party must demonstrate that irreparable injury will occur absent relief. *Id.* at 356-357. Also recognized in that holding, however, is the necessity for the court to consider that factor in conjunction with whether the moving party has shown a reasonable probability of success on the merits. *Id.* Similarly, the Tenth Circuit held in *Lundgrin* v. *Claytor* 619 F.2d 61 (1981) that among the prerequisites for preliminary injunctive relief is a showing that the movant will suffer irreparable injury if no injunction issues. *Id.* at 63. Here again, however, courts of this circuit are to consider other factors in addition to irreparable injury, such as the movant's probability of success on the merits and any damage to the opposing party which may be caused by the injunction's issuance. *Id.*

The decision of the court below conforms with none of the above-cited opinions of other courts of appeals with regard to the proper standard for granting interim injunctive relief. Instead, it worsens the already considerable uncertainty which surrounds appellate evaluation of district courts' disposition of such requests for equitable relief. By requiring a party to prove that irreparable injury will inevitably occur absent interim relief, the court below has established a new and insupportably stringent standard for an equitable remedy of crucial importance to

the rights of litigants. Presented as it is with this latest deviation from the standard which it endorsed in *Brown*, this Court should resolve the continuing confusion created by disparate standards by granting Mobil's petition for writ of certiorari.

B. The Court of Appeals Erred In Reversing The District Court's Proper Application Of The Generally Accepted Criteria For Interim Injunctive Relief.

Although the circuits may differ on their specific recitations of the appropriate grounds for granting preliminary injunctive relief, substantial areas of agreement nevertheless exist among the various courts of appeals regarding those factors deemed relevant in such an interlocutory determination. In the instant case, the district court acted within the scope of these established guidelines when it granted Mobil's request to bar DOE from issuing its January entitlements notice. By subsequently reversing that order, the court of appeals below ignored the reality that the district court's ruling accurately reflects proper application of views held by the majority of federal circuits. Moreover, it completely overlooked the district court's diligent application of these criteria to the extensive factual record which supports Mobil's injunction request. The decision below is therefore erroneous and merits full review by this Court.

As illustrated by the standards noted *supra*, it has been generally recognized that in the exercise of federal equity powers, such as the grant or denial of a preliminary injunction, district courts are required to focus on two key considerations: the probable rights of the moving party and the probable danger that those rights may be irretrievably lost prior to ultimate resolution of the merits of the controversy. In addition, the court must consider the extent to which harm may befall the non-moving party and others affected should the injunction issue. Fi-

nally, most courts recognize that the public interest must be weighed in evaluating whether to restrain the activity in question. 7 Moore's Federal Practice ¶ 65.04[1]; 11 Wright and Miller, Federal Practice and Procedure § 2948; Leubsdorf, The Standard For Preliminary Injunctions, 91 Harv. L. Rev. 525, 541 (1978).

In the case at bar, the district court properly ruled on the basis of these equitable considerations. It concluded that Mobil demonstrated "a likelihood of success on the merits and the possibility that it will suffer irreparable harm" if DOE is permitted to issue its January entitlements list. App. B at 85a. Mobil's probable success on the merits was recognized by the court's factual findings that DOE "potentially abused its discretion and acted in an arbitrary and capricious manner" in deciding to issue post-decontrol notices which it knew were not reasonably accurate due to the disappearing price-controlled crude oil problem. App. B at 52a.

Furthermore, the district court found that Mobil may be irreparably harmed if DOE issues the final entitlements notice, due to "the lack of any meaningful protection" from the loss of approximately $50 million it would be illegally required to pay under the notice. App. B at 77a. This conclusion was reached only after the district court considered at length the nature and practical significance of other administrative avenues of relief theoretically available to Mobil. Unlike the court of appeals which vacated the preliminary injunction, the district court put the abstract availability of such alternative options for relief within the factual context of a recalcitrant government agency that has offered no means to account for over $5.6 billion worth of entitlements obligations not channeled into its accounting system. Beyond this, the district court noted that no precedent exists for Mobil to attempt to recoup its financial

losses attributable to DOE's maladministration of the program, since the lost revenues are now in the hands of other entitlements refiner participants.

The three avenues of relief whose existence, according to the court of appeals, precludes Mobil from demonstrating it will suffer irreparable injury offer no effective means to remedy the losses which Entitlements Program participants will suffer upon promulgation of the final notices. The court below suggested that DOE might still rule on Mobil's emergency rulemaking petition for agency action on the Entitlements Program distortions. App. A at 5a. To view this as a potential remedial avenue flies in the face of the factual record considered by the district court, where it was made clear that, despite its awareness of the disappearing crude problem, the agency has done nothing about it throughout the program's existence. There is no logical reason to assume that DOE will change this stance.

The court of appeals also pointed to a judicial appeal of the decision of DOE's Office of Hearings and Appeals (OHA) as another potential means of obtaining ultimate relief absent an injunction. *Id.* In that decision, OHA ruled that it lacked jurisdiction to require the DOE division responsible for managing the program, the Economic Regulatory Administration, to make a full accounting of oil not previously booked into the system. Since DOE retains authority over its own internal delegation of responsibilities, the likelihood of success on such an appeal is at best minimal.

Finally, the court of appeals referred to DOE's "clean-up" mechanism in identifying a third alternative remedy which precludes a finding of irreparable injury. *Id.* The court below did not agree with DOE that this "clean-up" mechanism was itself a satisfactory avenue of relief for the losses claimed by Mobil. Instead, it said that Mobil

could file an administrative appeal of the issuance of the "clean-up" regulations. This "avenue of relief" is essentially identical to Mobil's emergency rulemaking petition in that the effectiveness of both is dependent upon the further initiative of DOE. As with the rulemaking petition, the probability that the agency will act at some future date is so minimal as to be discountable.

As this assessment of the purportedly alternate means of recovery demonstrates, it would be difficult to conceive of a more convincing set of facts wherein the lack of an effective remedy other than injunctive relief could be shown. When the district court considered Mobil's request for a preliminary injunction, it was clearly mindful of the futility of further reliance on DOE to correct wrongly imposed entitlements obligations. In that sense, its conclusion that Mobil "may suffer" irreparable harm is decidedly understated.

In short, the district court properly addressed those factors identified by a majority of courts as relevant in weighing whether preliminary injunctive relief is justified. It supported its decision to grant an injunction with a thorough examination of the extensive factual record and a balanced weighing of equitable considerations involved. In recognition of this commendable exercise in delicate judicial decision-making, this Court should grant Mobil's petition for writ of certiorari and reverse the order of the court below which vacated the preliminary injunction.

C. The Public Interest Would Be Best Served If The Decision Of The Court Below Is Reversed

In its position as *amicus curiae*, Hunt wishes to emphasize to this Court that the weight of the public interest militates in favor of reinstatement of the preliminary injunction vacated by the court of appeals. And as one of

the small refiner participants in the Entitlements Program whose interests, according to DOE, are alleged to be unreasonably impinged by judicial prohibitions against issuance of the post-decontrol entitlements lists, its views merit special notice by this Court.

As Mobil amply demonstrated before the district court, DOE's mismanagement of the Entitlements Program subverted the program's objective of equalizing access to price-controlled crude oil. To the extent that receipts of such crude oil were underreported, all refiner participants in the program were denied the intended benefits of the program. Hunt agrees with Mobil that requiring DOE to fully account for the disappearing crude before issuing further entitlements would bring more price-controlled oil back into the system, thereby making more entitlements available to all participants — buyers and sellers alike.

If DOE is permitted to issue post-decontrol notices without a full accounting, some program participants might enjoy a portion of entitlements benefits in the nearer future. They would likely forfeit, however, any opportunity of ever recovering the full share of entitlements benefits to which they have a right under DOE's program. The temporary inconvenience of a few program participants can in no way justify the issuance of admittedly inaccurate entitlements notices, especially since no mechanism currently exists with which to rectify the inaccuracies.

DOE suggests in its memorandum to this Court in opposition to the stay of the mandate of the court below that its decision to issue the final entitlements notices is predicated upon its concern for the well-being of small, independent refiners. Memorandum for the Federal Respondents in Opposition at 7. It contends that such refiners are more disadvantaged by continued delay of

the inaccurate notices than Mobil would be harmed by their issuance. *Id.* The facts illustrate no such concern. Since DOE has consistently failed to revise its own accounting requirements which gave rise to the massive disappearance of price-controlled oil, *all* refiners, including independents, have long suffered under the burden of an artificially low number of entitlements made available under the program. The fact that the agency has chosen to overlook flaws in its management of the program with such serious repercussions thus effectively undercuts this latest rationale for issuing the inaccurate notices and ending its involvement with the matter.

With respect to the more generalized public interest, the serious questions which Mobil has raised in connection with DOE's administration of the Entitlements Program should not be left unresolved due to the agency's refusal to act to correct abuses sanctioned by its own regulations. Such a precedent would undoubtedly undermine future public confidence in the federal government's regulatory processes. As the district court recognized,

> [t]he instant case represents one of the last opportunities to ensure that the DOE has lived up to its mandated obligations . . . in view of this fact, injunctive relief would serve the public interest until such time as the DOE can be made to rectify its present course.

App. B at 80a. The court of appeals' failure to appropriately gauge the public interest at stake in this case is among the most egregious of its errors and merits review by this Court.

Finally, the nature and importance of the remedy at issue in this case — preliminary injunctive relief from a federal district court — constitute reasons why the public interest would be best served if the decision of the court

below is reversed. Such interim relief is often the only means to assure that the rights of litigants are preserved prior to ultimate resolution of the controversy on its merits. The court of appeals here has established such a restrictive standard for granting preliminary injunctions that the remedy's availability may be unjustly limited in future applications of the ruling, especially in view of the limited factual record available when such motions are considered. So that district courts may continue to exercise their discretionary powers as necessitated by the balance of equities under the circumstances of each individual case, this Court should grant Mobil's request to review the decision below.

D. Conclusion

For all of the foregoing reasons, Hunt respectfully urges this Court to grant Mobil's petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,
PETITIONER,

v.

UNITED STATES DEPARTMENT OF ENERGY,
JAMES B. EDWARDS, SECRETARY OF ENERGY,
AND TOSCO CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES TEMPORARY
EMERGENCY COURT OF APPEALS

BRIEF FOR MAPCO INC. AS *AMICUS CURIAE*

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES TEMPORARY
EMERGENCY COURT OF APPEALS

BRIEF FOR MAPCO INC. AS *AMICUS CURIAE*

MAPCO Inc., as an *amicus curiae*, respectfully submits this brief urging this Court to grant a writ of certiorari to review the judgment of the United States Temporary Emergency Court of Appeals in *Mobil Oil Corp. v. DOE*, ____ F.2d ____ (TECA 1981), entered on August 14, 1981.

INTEREST OF MAPCO INC.

MAPCO is a "small" and "independent" refiner, as those terms are defined in Section 3 of the Emergency Petroleum Allocation Act of 1973, *as amended*, 15 U.S.C. § 752(7) (1976) and in Department of Energy regulations, 10 C.F.R. § 211.51. MAPCO has two refineries: the North Pole Fuels Plant Refinery located at Fairbanks, Alaska and the Delta Refinery located at Memphis, Tennessee. The combined capacity of these refineries is approximately 90,500 barrels of crude oil per day.

MAPCO has requested to file this brief as *amicus curiae* to oppose the termination of the Entitlements Program until such time as the Department of Energy has resolved the issue of the "disappearance" of vast quantities of price-controlled crude oil. The Entitlements Program was designed to equalize the price of crude oil to all refiners by requiring a financial adjustment among them based upon the availability to each of nonprice-controlled crude oil versus price-controlled crude oil. This objective has been thwarted by the "disappearance" of price-controlled crude oil.

Due to MAPCO's size and its reliance upon higher-priced crude oil, MAPCO was intended to be one of the principal beneficiaries of the Department of Energy's Entitlements Program, 10 C.F.R. § 211.67. In keeping with this intent, MAPCO has traditionally been a net seller of entitlements, which means that MAPCO received revenue from other refiners under the Program because of MAPCO's lack of access to lower-priced domestic crude oil. Price-controlled crude oil oil has been rapidly and increasingly "disappearing." It is the "disappearance" of price-controlled crude oil from the Entitlements Program which is the subject of this litigation. Because more priced-controlled crude oil has been reported as produced than has been reported as received for refining, it is known that price-controlled crude oil has "disappeared." The District Court found that this manipulation of reporting requirements had wrongfully increased crude oil costs to the extent of $5.6 billion. With the "disappearance" of price-controlled crude oil, MAPCO has recently been receiving less revenue from the Entitlements Program; indeed, MAPCO had to purchase $623,739 worth of entitlements, according to the Department of Energy's November 1980 Entitlements Notice. See 46

Fed. Reg. 10191, 10194 (1981). MAPCO anticipates that if the January 1981 Entitlements Notice is issued by the Department of Energy, MAPCO will once again be required to purchase entitlements. MAPCO has received less revenue and has been required to purchase entitlements because of the wrongful administration of the Entitlements Program by the Department of Energy. The profitability of MAPCO's refining and marketing operations will be at risk if the price-controlled crude oil that "disappeared" from the Entitlements Program is not accounted for.

MAPCO strongly supports Mobil's attempt to require the Department of Energy to correct the serious flaws in the Entitlements Program and to account for the massive quantity of price-controlled crude oil that has thus far "disappeared" from the Program. The only way to require the Department of Energy to account for the missing crude oil is to enjoin issuance of further Entitlements Notices until the Program is straightened out.

If the Court of Appeals' decision is not reviewed and reversed and the January 1981 Entitlements Notice issues, the Department of Energy will simply wash its hands of the problem of "disappearing" crude oil. This will cause small independent refiners, such as MAPCO, to incur permanent injury and permit other companies, which were never intended to be beneficiaries of the Entitlements Program, to derive $5.6 billion in unintended benefits, contrary to the intent of and at the expense of the intended beneficiaries.

The money at stake in this litigation is not the Department of Energy's money. The money belongs to the small independent refiners, who were intended to be the beneficiaries, but who are now being forced to

shoulder a severe economic burden due to the wrongful operation of the Program.

ARGUMENT

This Court should grant Mobil's Petition for Writ of Certiorari to review the judgment of the Court of Appeals in this case. The Court of Appeals committed a grave error in reversing the District Court's grant of a preliminary injunction because the Department of Energy has not and in all likelihood will not take any action to correct the serious abuses that have occurred in the Entitlements Program. In MAPCO's view, the irreparable injury involved in this appeal is not necessarily only the loss of revenues, which for small refiners like MAPCO would be substantial, but rather is the probability that the Department of Energy will do nothing to correct the problem if the injunction is lifted. Indeed, everything done by the agency in response to complaints about the "disappearance" of price-controlled crude oil from the Program indicates that the Department of Energy will abandon the Entitlements Program as soon as it is practicably able to do so.

Furthermore, the Court of Appeals' reliance on Mobil's alleged failure to exhaust administrative remedies is unavailing. The administrative remedies cited by the Court of Appeals are illusory and are, in any event, practically nonexistent for refiners such as MAPCO. This is due to the fact that none of these remedies will require the Department of Energy to act, which means that $5.6 billion worth of entitlements will not be disbursed as intended within the petroleum industry but will instead wind up in the pockets of refiners who have taken unfair advantage of the Program.

There can be no question, moreover, than in addition to Mobil, refiners such as MAPCO will be permanently injured unless the Court of Appeals' decision is reviewed and reversed by this Court. Far from placing a burden on small independent refiners, as the agency has maintained throughout this litigation, the grant of the injunction by the District Court is now the *only* guarantee that such refiners have that the Department of Energy will act to address the $5.6 billion problem of "disappearing" price-controlled crude oil.

If the Court of Appeals' decision is not reviewed and the Department of Energy issues its final Entitlements Notice, which the agency clearly intends to do as soon as possible, then MAPCO and other small refiners will probably be *wrongfully* forced to purchase entitlements. This unintended result is due entirely to distortion in the Program created by the "disappearance" of price-controlled crude oil. Moreover, neither MAPCO nor other refiners similarly situated have any practical avenue available — administrative or judicial — by which they might recover these revenues.

This conclusion is correct for at least two reasons.

First, the Department of Energy clearly does not intend to act in order to correct the problem unless it is forced to do so by the judiciary. The agency, through its attorneys in this litigation, in other civil actions and even before the agency's own adjudicatory body, has steadfastly maintained that the problem of "disappearing" price-controlled crude oil does not even exist. Thus, although administrative remedies may be theoretically available, there is virtually no chance whatever that the Department of Energy will alter its position and attempt to address the problem given its

long-standing resistance even to the suggestion that it act.

Second, the administrative remedies themselves are illusory. Mobil advised the agency of the existence of the problem of "disappearing" price-controlled crude oil some seven months ago when Mobil filed its Emergency Petition for Rulemaking. The agency has not yet ruled on Mobil's Emergency Petition. The Court of Appeals may truly believe that the agency will ultimately rule on Mobil's Emergency Petition for Rulemaking. However, to be candid, such an assumption is unrealistic in view of the agency's continued reluctance to act. In addition, Mobil could seek further court redress in order to overturn two agency decisions, one dismissing an appeal because of lack of jurisdiction and the other issuing "clean-up" regulations without any provision for correcting this problem. These remedies, however, even if concluded successfully, would establish only that the agency had jurisdiction to consider the problem and that the agency erred in not providing a mechanism for accounting for the price-controlled crude oil which has "disappeared." These avenues, in other words, would still not require the Department of Energy to embark on a course of action directed toward the solution of this problem.

Any temporary inconvenience or disadvantage that might possibly occur because of a brief delay in issuing the January 1981 Entitlements Notice while the agency accounts for all of the price-controlled crude oil that has "disappeared" would be more than offset by the issuance of an accurate entitlements list. Such a list would provide more entitlements to both buyers and sellers alike. It would work to the disadvantage of only those who had contributed to the creation of the

problem in that they would hopefully not receive an inequitable share of entitlements.

CONCLUSION

For the reasons set forth above, MAPCO respectfully requests this Court to grant Mobil's Petition for a Writ of Certiorari.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF NAVAJO REFINING COMPANY AS *AMICUS CURIAE* IN OPPOSITION TO THE GRANT OF CERTIORARI

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF NAVAJO REFINING COMPANY AS *AMICUS CURIAE* IN OPPOSITION TO THE GRANT OF CERTIORARI

This brief *amicus curiae* is submitted, with the consent of all parties, on behalf of Navajo Refining Company ("Navajo"), in support of the position of the Federal Respondents and Tosco Corporation and in opposition to the Petition for Certiorari to review the judgment of the United States Temporary Emergency Court of Appeals ("TECA") in *Mobil Oil Corporation* v. *DOE*, —— F.2d —— (Temp.Emer.Ct.App. 1981), entered on August 14, 1981.

Interest of Navajo Refining Company

Navajo, a "small" and "independent" refiner of crude oil within the meaning of Section 3 of the Emergency Petroleum Allocation Act of 1973, as amended,[1] operates a refinery in Artesia, New Mexico, with a certified capacity of 29,900 barrels of crude oil per day. As a small refiner with greater than average access to controlled crude oil, Navajo has always been a net purchaser of entitlements under the Entitlements Program, *i.e.*, it has been required to pay money into the program. However, for each of Navajo's fiscal years since its fiscal year ended July 31, 1976, the Office of Hearings and Appeals ("OHA") of the Department of Energy ("DOE") has granted Navajo some relief under the so-called *Delta-Beacon* standards.[2] This form of relief was developed by OHA to alleviate the serious hardship which would otherwise have been imposed upon some small refiners by the Entitlements Program. Under these standards, a small refiner was granted relief from entitlements purchase obligations otherwise imposed upon it to the extent necessary to enable it to achieve either its historical profit margin or its historical return on invested capital, whichever required the lesser relief.

OHA has decided, after lengthy administrative proceedings, that Navajo is entitled to *Delta-Beacon* relief in the amount of $1,744,645 "to compensate it for insufficient benefits received for its 1980 fiscal year." [3] OHA has also decided that Navajo is entitled to additional *Delta-Beacon* relief with respect to the period August 1980 through Jan-

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[1] 15 U.S.C. § 752.

[2] *See Delta Refining Co.*, 2 FEA ¶ 83,275 (Sept. 11, 1975); *Beacon Oil Co.*, 3 FEA ¶ 83,209 (June 8, 1976).

[3] *Navajo Refining Co.*, 7 DOE ¶ 82,596 (March 31, 1981).

uary 1981 in the amount of $5,188,027.[4] Thus, OHA determined that Navajo was entitled to relief in the total amount of $6,932,672. All of this relief was to be granted in the January 1981 entitlements notice. The amount which would actually be realized by Navajo as a result of the implementation of that notice would be less than $6,932,672, however, since Navajo's entitlement purchase obligation for January would have to be deducted. While Navajo will not know the precise amount of its January purchase obligation until the notice issues, Navajo estimates that its purchase obligation will be between $800,000 and $1,200,000 and that it will therefore receive a net amount of approximately $6,000,000 when the notice is finally published and implemented.

Under the applicable regulations this amount was to have been paid to Navajo in the ordinary course by March 31, 1981, and it would have been paid by then if the January notice had been issued by the scheduled date, March 15, 1981.[5] As a result of temporary restraining orders or preliminary injunctions granted by various district courts, however, including the preliminary injunction which was set aside by TECA in this case, Navajo has been deprived of this money. It is still deprived of it at the present time by the stay of TECA's mandate ordered by Justice Brennan on September 3, 1981.

Navajo, in the first nine months of its current fiscal year, has suffered an operating loss of $747,000[6], and its current cost of borrowing money is approximately 22¼%.[7]

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[4] *Navajo Refining Co.*, 8 DOE ¶ 82,526 (April 13, 1981).

[5] 10 C.F.R. § 211.67(i).

[6] This loss includes the accrual of the *Delta/Beacon* relief which Navajo has not yet received.

[7] Navajo is currently losing approximately $3,300 per day in interest, more than $600,000 to date.

Navajo, therefore, is urgently interested in the issuance of the January, 1981 entitlements notice, and the receipt of its $6,000,000, at the earliest possible date.

ARGUMENT

Navajo urges that certiorari not be granted to review the decision of TECA in this case. TECA correctly decided that Mobil Oil Corporation ("Mobil") had not shown irreparable injury and correctly observed that the preliminary injunction issued by the district court would be disruptive of the orderly administration of the Entitlements Program. Mobil's claim of harm is far outweighed by the harm to parties like Navajo and to the public interest. Thus, by any standard, the preliminary injunction issued by the district court was properly set aside. Moreover TECA's articulation of the reasons for its decision was entirely sound and in accord with the standards frequently enunciated by this Court. There is thus no basis for review of the TECA decision on certiorari.

A. TECA, in the Exercise of Its Special Expertise, Correctly Determined That the Preliminary Injunctive Relief Granted by the District Court Was Unsupported by Any Showing of Irreparable Harm and Would "By-Pass" Established and Orderly Procedures.

In enacting the Economic Stabilization Act,[8] Congress expressed special concern that judicial review be structured with a view to "speed and consistency of decisions" and the avoidance of "any breaks or stays" in the operation of the program. (S.Rep. No. 92-507, 92nd Cong., 1st Sess., p. 10 1971)). It was for that purpose that it determined to

[8] The provisions of the Economic Stabilization Act are made applicable to the Emergency Petroleum Allocation Act by Section 5(a)of that Act, 15 U.S.C. § 754(a).

"funnel into one court all the appeals arising out of the District Courts . . ." (*Ibid.*)[9] For the same reason, the authority of district courts to enjoin regulations or orders issued under the program was narrowly circumscribed.[10]

In the exercise of the special authority granted to it by Congress, and utilizing the expertise it has developed during the existence of the Entitlement Program, TECA determined in this case that the preliminary injunction obtained by Mobil in the district court bypassed "established and orderly procedures" and that there was "no conceivable reason" to do so since Mobil had not shown that it would sustain irreparable harm if it were required to comply with those procedures. Among the reasons why such a bypass was inappropriate was that "the nature of the claim and the proof" were of a sort that they should not, in the first instance, be dealt with by factual findings of a district court rather than by the appropriate agency.

This determination by TECA was entirely correct and does not require or warrant review by this Court.

The injunction which TECA reversed prevented the implementation of an agency order which affected not only the rights of Mobil but the rights of hundreds of participants in the Entitlements Program. It has prevented Navajo and many other refiners, large and small, from receiving sums which they should have been paid by March 31, 1981 and which many of them, like Navajo, urgently require. It has

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[9] *See also Bray* v. *United States*, 423 U.S. 73, 74 (1975); *Coastal States Marketing Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179, 186 (2nd Cir. 1979).

[10] Section 211(d), (e) of the Economic Stabilization Act, 12 U.S.C. § 1904 note. As Tosco Corporation pointed out in its brief in opposition to the stay of the mandate (pp. 11-12), this provision seems clearly to deprive the district court of jurisdiction to issue its injunction in this case, an issue which TECA found it unnecessary to reach.

relieved many others from paying sums which have long been due and enabled them to profit from continued retention of those funds.

There is nothing special about this particular entitlements notice which warrants its being singled out for such treatment. Contrary to Mobil's characterization of it as the "final entitlements list" (Petition For Certiorari, pp. 2, 6), it is merely the last of the series of lists which have been issued on a monthly basis for over six years. Were the list to have issued in the month to which it related (January, 1981), prior to the Presidential decree of decontrol, rather than two months later,[11] the implementation of the list would likely have been promptly consummated like those before it, rather than being caught up in the present imbroglio.

TECA correctly perceived that a remedy which barred the implementation of the multitude of purchase and sale transactions contemplated by the last of the regular monthly lists was a wholly inappropriate response to the case which Mobil had presented and was, indeed, inconsistent with "established and orderly procedures." [12]

The January 1981 list, whose issuance the district court enjoined, is in no sense a "final list." DOE does, however, contemplate the issuance of a "clean-up" list which will, in

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[11] Throughout the administration of the program these lists have been issued two months following the month to which they relate because of the time required to report the necessary information to DOE and for DOE to assimilate it.

[12] It should be noted that the claimed deficiency in the administration of the Entitlements Program to which Mobil points does not relate peculiarly to January 1981 or the January 1981 entitlements list. As the district court observed in its opinion (p. 9) "... *there was always* a financial incentive in the petroleum industry to find methods, whether legal or extra-legal, to 'convert' price controlled crude oil into uncontrolled crude oil" (emphasis supplied). Mobil is complaining of an alleged "disappearance" of controlled oil during the entire period of the program.

fact, be the final list under the Entitlements Program. This is the list provided for by its Final Rule adopted on July 9, 1981. 10 C.F.R. § 211.69, 46 Fed.Reg. 36092 (July 13, 1981). The precise purpose of this list is to make adjustments with respect to time periods covered by lists previously issued, including the January 1981 list. The Final Rule also provides a mechanism for the handling of claims adjudicated subsequent to the issuance of the final or "clean-up" list.

As TECA pointed out, Mobil may pursue whatever claim it has, and can ultimately prove, pursuant to the procedures prescribed by this Final Rule, or, if it regards those procedures as being insufficient, by seeking judicial review of the rule by which those procedures were established. Indeed, even if Mobil is correctly of the view that the issuance of DOE's "final entitlements list" (Petition for Certiorari, p. 2) or the "terminating" of the Entitlements Program without "corrective action" (*id.* at 7) would deprive it of the opportunity for relief, the injunction it obtained in the District Court had the wrong target. The proper target of an injunction would be the final "clean-up" list, not the long-overdue regular monthly list for January 1981.

The implementation of the January 1981 list will not terminate the Entitlements Program. Rather, it will permit the discharge of those claims and obligations which have been established for the month of January 1981 pursuant to the same procedures which have been in use for over six years. In Navajo's case, it will enable this small refiner to recover nearly $6,000,000 which DOE has found to be due it, after appropriate administrative proceedings. What Mobil seeks to do is to hold up the discharge of these established obligations pending the problematical outcome of its own claim.[13] TECA found such a result to be unsupported by

[13] OHA, in denying Mobil's appeal from its attempt to enjoin the issuance of the December, 1980 entitlements list stated:

any showing that it was necessary to prevent irreparable harm to Mobil. It was on firm ground in doing so.

If controlled oil has been improperly made to "disappear," Navajo has been harmed along with all others in the program who have not engaged in such conduct. If that can be proved, and if it is ultimately determined that a remedy can and should be provided,[14] Navajo would expect to benefit along with Mobil. Navajo does not believe, however, that it should be made to await such a day, if it ever comes, to recover the money now due it.

B. There Are No Issues Which Warrant Review by This Court

If TECA correctly concluded that Mobil's other remedies are adequate and that it will not be irreparably harmed by the orderly implementation of the last regular monthly entitlements list, then the reviewable issues which Mobil purports to find in the TECA decision evaporate.

It is unnecessary to parse through the differently expressed decisions of the various Courts of Appeals on the myriad applications for preliminary injunction which have come before them to conclude that a finding of irreparable injury is a necessary ingredient of a decision granting such an application. One need go no further than the decisions of

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"[R]escission of an entitlements notice or delay in publishing of a notice on the basis of ERA's failure to account for every barrel of price-controlled crude oil would create substantially more unfairness to more firms than would be the case of maintaining the status quo." *Mobil Oil Corporation*, 8 DOE ¶ 80,153 at 80,750 (July 8, 1981).

[14] A reading of the district court's opinion makes it clear that the investigatory and administrative problems involved in determining whether controlled oil "disappeared", how much "disappeared", who was responsible for the "disappearance", and what, if anything, should be done about it, are immense.

this Court. As this Court said in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975):

> "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits."

TECA's conclusion that an injunction should not have issued because "Mobil has failed to make a clear showing that it will suffer irreparable harm if an injunction does not issue" is plainly in accord with this "traditional standard."

Mobil's strenuous effort to define an issue worthy of this Court's attention reduces to quibbles over language. Quite naturally the various Courts of Appeals have used somewhat varying language, seized on by Mobil, in applying the "traditional standard" to the various situations before them. They have not, however, deviated, as they could not, from this Court's requirement, applied by TECA in this case, that irreparable harm be shown.

Nor was TECA remiss in failing to utter the words "abuse of discretion" when such abuse was plainly present or, in failing, in its decision, to sift through the district court's lengthy opinion, which was largely irrelevant to the issue on which TECA decided the case. The result reached by TECA was based simply on its observation that the statutory and regulatory framework, with which it was thoroughly familiar, made the relief which the district court had granted wholly inappropriate, and provided to Mobil other avenues of redress which it could pursue at less cost to others and to the public interest.

CONCLUSION

For the reasons stated, Navajo respectfully requests this Court to deny Mobil's Petition for a Writ of Certiorari and to terminate the stay of the issuance of TECA's mandate.

Respectfully submitted,

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Amicus Brief

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No. 81-499

In The

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL OIL CORPORATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, JAMES B. EDWARDS, SECRETARY OF ENERGY, AND TOSCO CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR NEWHALL REFINING CO., INC. AS AMICUS CURIAE

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BRIEF FOR NEWHALL REFINING CO., INC. AS AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Newhall Refining Co., Inc. (Newhall), as *amicus curiae*, respectfully submits this Brief in support of the Petitioner, Mobil Oil Corporation (Mobil). The written consent of all parties to the filing of this Brief is filed separately.

I.

INTEREST OF AMICUS CURIAE

Newhall is a Delaware corporation doing business in the State of California. Newhall owns and operates a refinery located in Newhall, California and markets refined petro-

leum products principally within a sixty mile radius of Los Angeles, California. The refinery has a refining capacity of 20,000 barrels per day and manufactures gasoline, jet fuel, diesel fuel, fuel oil, light gas oil, and asphalt. Newhall is a small and independent refiner as those terms are defined in the Emergency Petroleum Allocation Act. 15 U.S.C. § 752 (3, 4).

On September 1, 1981, Newhall initiated a suit in the United States District Court of Delaware, Civil Action No. 81-396, contesting the validity of an Order entered by the Department of Energy (DOE), which Order, if implemented, would require that Newhall be included in the next entitlements notice issued as a buyer of entitlements. Newhall sought in such suit a declaratory judgment that the DOE Order was invalid and a temporary restraining order and preliminary injunction preventing implementation of the allegedly invalid Order.

On September 18, 1981, the district court, after a hearing, denied Newhall's application for a preliminary injunction and dismissed Newhall's complaint.

In the district court, Newhall argued that it would be irreparably harmed if the Order were implemented, since the "clean-up mechanism" adopted by the DOE in its Final Rule [46 Fed. Reg. 36092 (July 13, 1981) (to be codified in 10 C.F.R. § 211.69)] was ineffective to assure Newhall that any sums it was wrongfully required to pay could be recovered. In response, the district court held that such contention was foreclosed by the opinion of the Temporary Emergency Court of Appeals in *Mobil Oil Corp. v. DOE*, No. 2-35 (Temp.Emer.Ct. App. August 7, 1981), noting that

Mobil's claim of irreparable injury on that basis had been rejected. Newhall therefore addresses the question whether the Temporary Emergency Court of Appeals erred in holding that Mobil failed to show irreparable harm.

II.

SUMMARY OF ARGUMENT

The opinion of the Temporary Emergency Court of Appeals should be reviewed by this Court for three reasons. First, the court of appeals erred in failing to consider the finding of the district court that the DOE had exceeded its statutory authority. The courts have held that if an agency violates its statutory authority, the courts should not inquire into the traditional requirements for equitable relief. As the district court held that the DOE had exceeded its statutory authority, before the court of appeals could reach the question of irreparable harm, it had to consider whether the district court abused its discretion in making that holding.

Second, the court of appeals erred in relying on the existence of the clean-up mechanism in finding that Mobil had not shown irreparable harm. The question of the effectiveness of the Final Rule was never orally argued before the court of appeals, and the court did not consider any of the numerous defects contained in such rule. The effectiveness of the Final Rule should be addressed by this Court before it is relied upon to defeat Mobil's judicial review.

Finally, the opinion of the court of appeals should be reversed, withdrawn, or clarified as to the question of whether the existence of the clean-up mechanism precludes a showing of irreparable harm. The opinion of the court of

appeals has been used by the DOE to support such proposition, and, unless such opinion is reviewed, other refiners may be unable to obtain injunctive relief.

For these reasons, this Court should grant Mobil's petition for writ of certiorari and review the opinion of the court of appeals.

III.

ARGUMENT

In addition to the points raised by Mobil, we believe that this Court must review the opinion of the court of appeals for three additional reasons: (1) the court of appeals erred in failing to consider the finding of the district court that the DOE had exceeded its statutory authority; (2) the court of appeals erred in relying on the existence of the clean-up mechanism in finding that Mobil had not shown irreparable harm; and (3) the opinion of the court of appeals, unless reversed, withdrawn, or clarified, will be relied upon as a finding that the existence of the clean-up mechanism precludes a showing of irreparable harm.

A. The Temporary Emergency Court of Appeals Erred in Failing to Consider the Finding of the District Court that the Department of Energy Had Exceeded Its Statutory Authority.

In the district court, Mobil alleged that the DOE had exceeded its statutory authority. The court noted that to examine that claim, it had to examine the limits of the DOE's authority and compare them with the DOE's action. *Mobil Oil Corp. v. DOE*, C. A. No. 81-CV-340, at 50 (N.D. N.Y., June 3, 1981), *citing Citizens to Preserve Overton*

Park v. Volpe, 401 U.S. 402, 415-16 (1971). After such a comparison, the district court concluded that the DOE had illegally exceeded its statutory authority.

That holding by the district court was never reviewed by the court of appeals. The failure to review was error, as the question of the validity of the actions of the DOE is crucial to the consideration of the preliminary injunction.

It is well-established that when federal statutes have been violated, the court should not inquire into traditional requirements for equitable relief. *National Wildlife Federation v. Andrus*, 440 F.Supp. 1245, 1255 (D.D.C. 1977); *Community Nutrition Institute v. Butz*, 420 F.Supp. 751, 754 (D.D.C. 1976), *citing United States v. City and County of San Francisco*, 310 U.S. 16, 30-31 (1940). In the present case, since the district court held that the DOE had exceeded its statutory authority, the court did not need to examine further the equitable factors involved. By the same token, the court of appeals had to consider whether the district court abused its discretion in holding that the DOE had exceeded its authority before it could examine the question of irreparable harm. *See Brown v. Chote*, 411 U.S. 452, 457 (1973); *Alabama v. United States*, 279 U.S. 229, 230-31 (1929). The court of appeals did not address the holding of the district court that the DOE exceeded its authority. Without addressing that issue, the court of appeals could not possibly have found that Mobil had not suffered irreparable harm. This Court should address such significant issue.

B. The Temporary Emergency Court of Appeals Erred in Relying on the Existence of the Clean-Up Mechanism in Finding that Mobil Had Not Shown Irreparable Harm.

Subsequent to the hearing on Mobil's application for a preliminary injunction, and subsequent to submission of oral argument before the Temporary Emergency Court of Appeals, the DOE issued what it denominated its Final Rule in connection with the "Establishment of a Mechanism for Entitlements Adjustments for Periods Prior to Decontrol of Crude Oil." 46 Fed. Reg. 36092 (July 13, 1981) (to be codified in 10 C.F.R. § 211.69). The Final Rule varied substantially from the proposed rule previously published by the DOE, which provided for, among other things, the creation of an escrow account in the amount of $50,000,000, which account would have served as security for claims and adjustments finalized after issuance of the final entitlements notice. 46 Fed. Reg. 15112, 15115-16 (March 3, 1981).

Notwithstanding that the Final Rule was issued after the hearing on Mobil's application for preliminary injunction, and subsequent to oral argument before the Temporary Emergency Court of Appeals, the court of appeals apparently relied on the purported effectiveness of the mechanism established by the Final Rule as sufficient to assure that a refiner, who is wrongfully required to purchase entitlements, may recover those wrongfully exacted funds. The remedy provided for in the Final Rule is ineffective to grant such assurance and the court of appeals erred in so holding.

Although the court of appeals did not expressly state that the clean-up mechanism would serve as a remedy for harm caused Mobil by the issuance of the next (and subsequent) entitlements lists, the court of appeals stated:

> "It is unnecessary to review the merits of Mobil's explanations of how it sustains the contentions it advances. This court finds that Mobil has failed to make

> a clear showing that it will suffer irreparable harm if an injunction does not issue. *Triebwasser & Katz v. American Telephone & Telegraph Company*, 535 F.2d 1356, 1359 (2d Cir. 1976).
>
> Mobil has not shown that issuance of the notice will place it in a position which precludes ultimate recovery, through judicial or administrative proceedings, of losses allegedly traced to previous erroneous entitlements notices."

Mobil Oil Corp. v. DOE, supra, slip opinion at 4.

The deficiencies in the clean-up mechanism are readily apparent from the most casual examination of the procedure suggested by the DOE. Under the clean-up mechanism, if any refiner is, subsequent to publication of the clean-up list, ultimately determined to have a net claim, each of the numerous refiners to be included on that list (which of necessity will exceed three hundred individual companies) will be deemed to owe such refiner its respective proportionate part of such net claim. Absolutely no provision is made with respect to the refiners who are now in bankruptcy proceedings, such as Basin Refining, Inc., [*see In re Basin Refining, Inc.*, Cause No. 381-00792-F (N.D. Tex., filed June 6, 1981), nor with respect to refiners who are now shutdown or are now, or by that time may be, out of business. Further, small refiners cannot readily afford to pursue claims against every recalcitrant refiner that does not wish to pay. The claims being enforced by a refiner will arise out of court or administrative proceedings to which the obligated refiners will not, ordinarily, have been a party. In addition, if all refiners on the list are to be required to pay their respective proportionate parts of any such successful claims, it

follows that every refiner should therefore be deemed to be a party adversely affected by such proceeding and thereby entitled to participate in the prior agency or court proceeding. Finally, refiners seeking to collect refunds of money previously paid, or exception relief ultimately granted, could not rely on assistance from the DOE in collecting such funds, as the DOE has stated that the mechanism "would not require further administrative action." 46 Fed. Reg. 36092, 36096 (July 13, 1981).

In response to criticism of the Final Rule, the DOE has issued one "technical amendment" in an effort to correct one major discrepancy in the Final Rule, the lack of a provision for determining when an order of the Federal Energy Regulatory Commission becomes final and no longer subject to judicial appeal. 46 Fed. Reg. 43653 (August 31, 1981) (to be codified in 10 C.F.R. § 212.78). Other defects and discrepancies have not been corrected and a serious question exists as to whether the DOE has the authority to amend or promulgate additional rules after September 30, 1981 to correct such defects and discrepancies. In reversing the Order of the district court, and issuing its August 14, 1981 Opinion, the court of appeals did not consider the defects and discrepancies in the existing clean-up mechanism or that such mechanism is not an effective remedy for a refiner who is wrongfully required to purchase entitlements pursuant to the next entitlements notice published by the DOE.

In discussing the clean-up mechanism, the court of appeals dismissed any consideration of the effectiveness of the Final Rule in stating:

> "Subsequent to the argument of this appeal, ERA issued a Final Rule to comply with the suggestion of the Executive Order that a mechanism be established to adjust entitlements obligations for periods prior to decontrol. 10 C.F.R. § 211.69, added July 9, 1981, 46 Fed. Reg. 36092, July 13, 1981. The rule provided for a final "clean-up" list, effectively ending the Entitlements Program; and for a self-executing mechanism intended to account for judicial and administrative determinations made after the August 15, 1981 reporting date for the final list. If Mobil is dissatisfied with this Final Rule, it is free to file an administrative appeal from this rule making. 10 C.F.R. § 205.160(b); 5 U.S.C. § 553.
>
> Thus it is clear at this writing that Mobil has remedies which will give it an opportunity to have its claims reviewed and adjudicated. There is no conceivable reason why established and orderly procedures should be bypassed...."

Mobil Oil Corp. v. DOE, *supra*, slip opinion at 6.

It is submitted that the effectiveness of the Final Rule should be carefully reviewed and not summarily assumed with the statement that a party dissatisfied with the Final Rule is free to file an administrative appeal, and that this Court should review the Final Rule as adopted by the DOE.

C. The Opinion of the Temporary Emergency Court of Appeals, Unless Reversed, Withdrawn, or Clarified, Will Be Relied Upon as a Finding that the Existence of the Clean-Up Mechanism Precludes a Showing of Irreparable Harm.

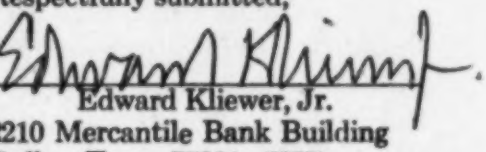
In its opinion, the court of appeals, arguably, has implicitly approved the clean-up mechanism established by the DOE. Even if the opinion should not be deemed to even implicitly approve such mechanism as a remedy for the

recovery of funds a refiner has been wrongfully required to pay, the DOE is relying on the opinion for that proposition. As indicated above, for example, in Newhall's case, the opinion by the court of appeals was urged by the DOE as a decision binding on the district court that a refiner was not irreparably harmed by purchasing entitlements since the clean-up mechanism was available. The district court was persuaded by this argument and cited such opinion as authority for the proposition that a refiner will not be irreparably harmed by purchasing entitlements. Thus, unless this Court reviews the opinion of the court of appeals and the clean-up mechanism, other small refiners may be unable to obtain needed injunctive relief, even though such refiners could otherwise demonstrate their entitlement to such relief.

IV.
CONCLUSION

For the reasons stated above, Newhall submits that this Court should grant Mobil's petition for writ of certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief For Newhall Refinining Co., Inc. As Amicus Curiae were served this 24th day of September, 1981, on each of the following by depositing in a United States mailbox, certified mail, return receipt requested:

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On Petition for a Writ of Certiorari To The United States Temporary Emergency Court of Appeals

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MOTION OF TEXAS CITY REFINING, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION OF TEXAS CITY REFINING, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36 of the Supreme Court Rules, Texas City Refining, Inc. ("TCR"), respectfully requests leave to file the attached Brief *Amicus Curiae* in support of the position of Mobil Oil Corporation,

Petitioner, in the instant proceeding. In support of this Motion, TCR states the following:

1. TCR is a small and independent refiner,* with a capacity of 126,000 barrels per day. It operates a single coastal refinery located in Texas City, Texas, and provides petroleum products to Agway Petroleum Corporation, a wholly owned subsidiary of Agway Inc., and to Southern States Cooperative, Inc., which supply agricultural commodities for their farmer members and other farmer patrons.

2. Although TCR has historically been a *seller* of entitlements under the Department of Energy's ("DOE") Entitlements Program, 10 C.F.R. § 211.61, *et seq.* (1981), the rapidly increasing disappearance of price-controlled crude oil and the corresponding decline in the National Domestic Crude Oil Supply Ratio ("DOSR") changed TCR into a *purchaser* of entitlements in the last several months of the Program.

3. TCR anticipates that its share of the burden under the Entitlements Program will increase significantly if the January Entitlements List is issued without adjustment for DOE's failure to require refiners to reflect all price-controlled crude oil in the Entitlements Program.

4. As a result, TCR would bear a disproportionate share of the burden under the Entitlements Program and will incur entitlements obligations that are not justified.

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* TCR is a "small" and "independent" refiner as defined in Section 3 of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 752.

5. Refiners like TCR, which have been historical sellers of entitlements and who have properly reported their crude oil receipts under the Entitlements Program, will be irreparably harmed if the January Entitlements List is issued without DOE having accounted for all crude oil produced and received into refineries during the period of the Entitlements Program. Issuance of the January Entitlements List would, therefore, impose a substantial and unfair burden on TCR.

6. For these reasons, the Court should grant TCR's Motion for Leave to File Brief Amicus Curiae.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF TEXAS CITY REFINING, INC.

I. INTEREST OF THE AMICUS CURIAE

Texas City Refining, Inc. ("TCR") is a small and independent refiner,[1] with a capacity of 126,000 barrels per day. It operates a single coastal refinery located in Texas City, Texas. Two-thirds of the outstanding capi-

[1] TCR is a "small" and "independent" refiner as defined in Section 3 of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 752.

tal stock of TCR is owned by Agway Petroleum Corporation ("Agway Petroleum"), which in turn is owned by Agway Inc. ("Agway"). The remaining one-third of the outstanding capital stock is owned by Southern States Cooperative, Inc. ("Southern States"). TCR provides petroleum products to both Agway Petroleum and Southern States. Agway and Southern States are engaged in the manufacturing, processing, distribution, wholesale purchasing, and marketing of agricultural commodities for their farmer members and other farmer patrons. Farmers in 14 Eastern states are dependent upon adequate supplies of fuel provided by Agway and Southern States in order to maintain continuous agricultural production.

Historically, TCR has been a *seller* of entitlements under the Department of Energy's ("DOE") Entitlements Program.[2] This resulted from the fact that TCR had available to it only about 15,000 barrels per day of price-controlled crude oil, or only about 12 percent of its refining capacity. In addition, because of the termination of TCR's contracts with its foreign suppliers over the last few years, TCR was required to seek emergency allocations of crude oil under the Department of Energy's ("DOE") Crude Oil Buy/Sell Program,[3] and the crude oil TCR purchased pursuant to this Program was decontrolled. Indeed, in the last four months of the Entitlements Program, TCR had available to it an average of only 2,750 barrels per day of price-controlled crude oil, or only 3.4 percent of actual crude oil refined.

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[2] 10 C.F.R. § 211.61, *et seq.* (1981).

[3] 10 C.F.R. § 211.65(c)(2) (1981).

However, despite the fact that TCR historically had been a seller of entitlements and that its access to price-controlled crude oil was decreasing, TCR became, in the waning months of the Entitlements Program, a purchaser of entitlements. The reason was the rapidly increasing disappearance of price-controlled crude oil and the corresponding decline in the National Domestic Crude Oil Supply Ratio ("DOSR"). Thus, in January and February 1981, TCR was required to purchase a total of approximately $6.6 million in entitlements pursuant to the November and December Entitlements Lists. TCR anticipates that its share of the burden under the Entitlements Program will increase significantly if the January Entitlements List is issued without correction.[4]

TCR, a small, independent refiner with limited access to price-controlled crude oil, was changed from a net seller to a net purchaser of entitlements as a result of DOE's failure to require refiners to reflect all price-controlled crude oil in the Entitlements Program.[5] As a result of miscertification of oil, the Tertiary Incentive Program,[6] and various manipulative

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[4] In addition, if the January List is issued, TCR will be required to purchase an additional $3.9 million in entitlements over and above its already disproportionate purchase obligation as a result of a recent decision by the Office of Hearings and Appeals of DOE to terminate a stay of TCR's entitlements obligations which was granted in 1978. *Texas City Refining, Inc.*, Case No. BEX-0192 (Supplemental Order issued April 15, 1981).

[5] This point was addressed in detail in the exhaustive 80-page opinion of the district court below. App. B (9a-85a) to the Petition for a Writ of Certiorari of Petitioner Mobil Oil Corporation.

[6] 10 C.F.R. § 212.78 (1981).

inventory and accounting practices, the DOSR has sharply declined in the waning months of the program as large quantities of price-controlled oil have disappeared.[7] No provision has been made by DOE to account for such price-controlled oil before the Entitlements Program terminates. If the January Entitlements List comes out without such an accounting, historical *sellers* of entitlements like TCR will be irreparably injured just like historical *purchasers* of entitlements. Because it has properly reported its crude oil receipts under the Entitlements Program, TCR will bear a disproportionate share of the burden under the Entitlements Program and will incur entitlements obligations that are not justified under the Entitlements Program, DOE's regulations, or the Emergency Petroleum Allocation Act of 1973, as amended.[8]

---

[7] TCR testified before DOE in Docket Nos. ERA-R-80-02 and 80-09A with respect to the problem posed by the declining DOSR. In these proceedings, TCR strongly urged DOE to take immediate action to deal with miscertification of oil under the Entitlements Program by certain refiners and resellers, and emphasized that TCR was suffering severe economic harm as a result of the miscertification and of DOE's failure to act. Subsequently, on February 10, 1981, TCR joined in Mobil's request for an emergency rulemaking to deal with the issue by accounting for all price-controlled oil which had been produced and received into refineries during the period of the Entitlements Program. This request has been ignored by DOE.

[8] 15 U.S.C. § 751, *et seq.* (1976).

II. REASONS FOR GRANTING THE WRIT

A. The District Court Did Not Abuse Its Discretion In Granting Injunctive Relief.

The traditional standard for granting a preliminary injunction requires the plaintiff to show, *inter alia*, that, in the absence of the issuance, he will suffer irreparable injury and that he is likely to prevail on the merits. *Doran* v. *Salem Inn., Inc.*, 422 U.S. 922, 931 (1975). But while the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion. *Brown* v. *Chote*, 411 U.S. 452, 457 (1973).

In its decision, the court of appeals failed to follow the appropriate standard of appellate review. The court, in effect, made a *de novo* determination whether, in its own view, Petitioner Mobil Oil Corporation ("Mobil") was entitled to injunctive relief. By so acting, the court erred both in applying the wrong standard and in failing to find that the district court did not abuse its discretion in concluding that issuance of a preliminary injunction was warranted.

Before the district court, Mobil clearly demonstrated that DOE had failed to require refiners to reflect all price-controlled crude oil in the Entitlements Program, that no provision had been made by DOE to account for such price-controlled oil before the Entitlements Program terminated, and that DOE had failed to deal meaningfully with the problem of disappearing price-controlled oil, despite the fact that it had ample notice. Further, Mobil demonstrated that,

if the January Entitlements List were issued, DOE's failure to account for all price-controlled oil would irreparably injure those refiners, like Mobil and TCR, which had properly reported their crude oil receipts under the Entitlements Program.

As found by the district court in its comprehensive opinion, Mobil also made a sufficient showing of the likelihood of ultimate success on the merits. Indeed, the district court held that the public interest would be best served by terminating the Entitlements Program only after an accounting of all price-controlled oil had been made by DOE. Recognizing that the issuance of an injunction would only disadvantage refiners which were unjustly benefiting by the disappearance of the price-controlled crude oil, the district court properly issued the preliminary injunction. Such action was not and has not been shown to be an abuse of discretion.

B. There Is A Need To Clarify The Standard To Be Used In Granting Preliminary Injunctive Relief.

In overturning the district court's issuance of a preliminary injunction, the court of appeals held that it was "unnecessary" for it to consider Mobil's likelihood of success on the merits because "this court finds that Mobil has failed to make a clear showing that it will suffer irreparable harm if an injunction does not issue". The court's ruling underscores the fact that the standard for determining whether preliminary injunctive relief should be granted suffers from inconsistent formulations among the circuits. There is a clear need to clarify the standard to be applied in considering requests for preliminary injunctive relief as a result of the confusion which has been spawned

by diverse application of the "irreparable injury" test.

Some circuits, as in the instant case, have interpreted this test to require that the party seeking preliminary relief prove that ireparable injury will necessarily occur if the injunction is denied. This approach has been adopted in the Third, Fifth, and Sixth Circuits. *See, e.g., Continental Group, Inc.* v. *Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980); *Foley* v. *Alabama State Bar*, 648 F.2d 355, 358 (5th Cir. 1981); *Gilley* v. *United States*, 649 F.2d 449, 454 (6th Cir. 1981).

Other circuits, however, have held that the very nature of the inquiry on petition for preliminary relief militates against a wooden application of the irreparable injury test. These circuits, in essence, hold that the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined. Thus, they conclude that an effort to apply an *absolute* irreparable injury test in all cases is inappropriate. Circuits recognizing this approach include the Second, Ninth and District of Columbia Circuits. *Charlie's Girls, Inc.* v. *Revlon, Inc.*, 483 F.2d 953 (2nd Cir. 1973) (*per curiam*); *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), *Los Angeles Memorial Coliseum Comm'n* v. *National Football League*, 634 F.2d 1197 (9th Cir. 1980). The Seventh and Tenth Circuits also apply a less stringent test than that applied by the court of appeals in this case. *Lundgrin* v. *Claytor*, 619 F.2d 61, 63 (10th Cir. 1980); *Citizens for a Better Environment* v. *City of Park Ridge*, 567 F.2d 689, 690-91 (7th Cir. 1975).

Given the conflict and confusion among the courts of appeals as to the proper standard to be applied in granting injunctive relief, compelling reasons exist for this Court to rule upon this important issue.

III. CONCLUSION

Wherefore, it is respectfully requested that this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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